Boston University School of Law Transcript Guide

SYMBOLS OR ABBREVIATIONS

AUD	Audit	**H**	Honors
CR	Credit	**NC**	No credit
P	Pass	**F**	Fail
W/D	Withdrawal from course		
*	Indicates currently enrolled		
(C)	Clinical		
(S)	Seminar		
(Y)	Year-long course		

Academic Qualifications – JD Program: The School of Law has a letter grading system in courses and seminars. The minimum passing grade in each course and seminar is a **D**. Beginning with the Class of 2017, a minimum of eighty-five passing credit hours must be completed for graduation. Prior classes required a minimum of eighty-four passing credit hours. The minimum average for good standing is C (2.0) and the minimum average for graduation is C+ (2.3). Prior to 2006 the minimum average for good standing and graduation was C (2.0).

GRADING SYSTEM

1. **Current Grading System** The following letter grade system is effective fall 1995. The faculty has set the following as an appropriate scale of numerical equivalents for the letter grading system used in the School of Law:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

For all courses and seminars with enrollments of 26 or more, grade distribution is mandatory as follows:

A+	0-5%
A+, A, A-	20-30%
B+ and above	40-60%
B	10-50%
B- And below	10-30%
C+ and below	0-10%
D, F	0-5%

2. **Fall 1995-Spring 2008**

For **first-year courses** with enrollment of twenty-six or more, grade distribution is mandatory as follows:

A+	0-5%
A+, A, A-	20-25%
B+ and above	40-60%
B	10-50%
B- and below	10-30%
C+ and below	5-10%
D, F	0-5%

3. **1991 Changes to Letter Grade System.**

The curve is mandatory for all seminars or courses with enrollments of twenty-six or more.

Grade	Number Equivalent	Curve
A+	4.5	
A	4.0	15-20%
B+	3.5	
B	3.0	50-60%
C+	2.5	
C	2.0	20-35%
D	1.0	
F	0	

The median for all courses with enrollments of twenty-six or more is B. For smaller courses, a median of B+ is recommended but not required.

GRADES FOR COURSES TAKEN OUTSIDE THE SCHOOL OF LAW

Grades for courses taken outside of BU Law are recorded as transmitted by the issuing institution or as CR. Credit toward the degree is granted for these courses and no attempt is made to convert those grades to the BU Law grading system. The grade is not factored into the law school average.

CLASS RANKS

BU Law does not rank students in the JD program with the following exceptions:

Mid-Year Ranks

Effective May 2014, the Registrar is authorized to release the g.p.a. cut-off points to the top 5%, 10%, 15%, 20%, 25% and one-third for the fifth semester in addition to third semester reporting adopted May 2013 and yearly reporting of the same.

Effective January 2013

For students who have completed their third semester, with respect to the cumulative average earned during the fall semester, the Registrar will inform the top fifteen students of their rank and will provide g.p.a. cut-off points for the top 10 percent, 25 percent and one-third of the class. This is in addition to the yearly reporting described below.

Effective May 2011

For students who have completed their first year, the Registrar will inform the top five students in each section of their section rank and will provide grade point average cut-offs for the top 10 percent, 25 percent and one-third of each section.

For students who have completed their second year or third year, with respect to both the average earned during the most recent year and cumulative average, the Registrar will inform the top fifteen students of their rank and will provide g.p.a. cut-off points for the top 10 percent, 25 percent and one-third of the class.

Class of 2008 and subsequent classes through April 2011.

For students who have completed their first year, the Registrar will inform the top five students in each section of their section rank and will provide g.p.a. cut-off points for the top 10 percent of each section.

For students who have completed the second year or third year, with reference to both the second-year or third-year g.p.a. and cumulative g.p.a., the Registrar will inform the top fifteen students in the class of their ranks and will provide g.p.a. cut-off points for the top 10 percent of the class.

Scholarly Categories (Based on yearly averages only)

Class of 2008 and subsequent classes:

First Year – the top five students in each first-year section will be designated G. Joseph Tauro Distinguished Scholars. The remaining students in the top ten percent of each first-year section will be designated G. Joseph Tauro Scholars.

Second Year – the top fifteen students in the second year class will be designated Paul J. Liacos Distinguished Scholars. The remaining students in the top ten percent of the second-year class will be designated Paul J. Liacos Scholars.

Third Year – the top fifteen students in the third year class will be designated Edward F. Hennessey Distinguished Scholars. The remaining students in the top ten percent of the third-year class will be designated Edward F. Hennessey Scholars.

Graduate Program Transcript Guides

LL.M. in Taxation

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

The grade averages of continuing part-time students whose enrollment began before the fall 1995 semester were converted to the new number equivalents.

Fall 1991 to Spring 1995

From the fall 1991 semester through the spring 1995 semester, the following letter grading system was in effect for students who were graduated before the fall 1995 semester:

A+	4.5	C+	2.5
A	4.0	C	2.0
B+	3.5	D	1.0
B	3.0	F	0.0

Current Degree Requirements

Effective May 2016, completion of 24 credits. Minimum average of 2.3 and no more than one grade of D.

Spring 1993 to Fall 2015

Completion of 24 credits. Minimum average of 3.0 and no more than one grade of D.

Fall 1991 to Fall 1993

Completion of ten courses (20 credits). Minimum average of 3.0 (with no more than one grade below 1.0).

LL.M. in Banking and Financial Law

Current Grading System

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Effective April 2016, completion of 24 credits with a minimum average of 2.7 and no more than one grade of D or F.

Fall 2012 to Spring 2016

Completion of 24 credits with a minimum average of 3.0 and no more than one grade of D or F.

Fall 1991 to Fall 2012

Completion of ten courses (20 credits). Minimum average 3.0 (with no more than one grade below 1.0).

LL.M. in American Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Completion of twenty-four course credits with at least ten credits per semester. The minimum average for good standing and graduation is 2.3. Minimum course average is 2.0.

LL.M. in Intellectual Property Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
C-	2.7		

Current Degree Requirements

Completion of twenty-four course credits with at least ten credits per semester. The minimum average for good standing and graduation is 2.3. Minimum course average is 2.0.

Executive LL.M. in International Business Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Effective Spring 2014, completion of twenty credits with a minimum g.p.a. of 3.0 including the successful completion (CR) of two colloquia.

Grading System prior to Spring 2014

Honors (H)	Credit (CR)
Very Good (VG)	No Credit (NC)
Pass (P)	Fail (F)

Requirements Prior to Spring 2014

Completion of six courses (18 credits) and two colloquia (2 credits) for a total of 20 credits. The minimum passing grade for each course is Pass (P). The minimum passing grade for each colloquium is Credit (CR).

5/2016 rev2

Boston University's policies provide for equal opportunity and affirmative action in employment and admission to all programs of the University.

BU School of Law

Transcript Guide Addendum

JURIS DOCTOR PROGRAM
LL.M. IN AMERICAN LAW PROGRAM
LL.M. IN INTELLECTUAL PROPERTY LAW PROGRAM

Grading System – Distribution Requirements

Effective Fall 2019

For all courses and seminars with enrollments of 26 or more, grade distribution is mandatory as follows:

A+	2-5 %
A+, A	15-25%
A+, A, A-	30-40%
B+ and above	50-70%
B	15-50%
B- and below	0-15%
C+ and below	0-10%
D, F	0-5%

Fall 2020

The distribution requirement for Fall 2020 upper-class courses with 26 or more students was suspended. Upper-level courses with 26 or more students were required to conform to a B+ median.

Effective Spring 2021

For all upper-level courses with an enrollment of 26 or more a B+ median is required with the following additional constraints:

A+	Maximum 5%
A+, A, A-	Minimum 30%
B and below	Minimum 10%
B- and below	Maximum 15%
C+ and below	0-10%
D, F	0-5%

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June 17, 2023

Dear Judge:

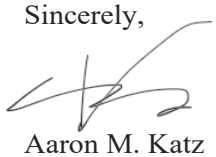
It is my pleasure to recommend Cameron Campbell for a judicial clerkship in your chambers. As background, I am a litigator specializing in white collar criminal defense, the False Claims Act, and federal habeas corpus. I routinely appear in federal courts across the country, both at the trial and appellate levels. After graduating from Harvard Law School in 2004, I clerked on the U.S. Court of Appeals for the Second Circuit. I then practiced law at Ropes & Gray LLP for 17 years and was an equity partner at the firm from 2013 through 2022. Since 2021, I have been an adjunct professor at Boston University School of Law, teaching Trial Advocacy. My Trial Advocacy course combines (1) workshops that teach students basic and advanced trial skills; (2) a full mock trial where students, working in teams, try a case from opening statement through closing argument; and (3) participatory classroom lectures that address a variety of subjects, including advocacy theories, behavioral psychology, Rules of Evidence, and procedural rules.

Cameron was a member of my Trial Advocacy course for the Spring 2023 semester. Cameron was among the top students in the class. Cameron is a naturally gifted orator with the potential to be an excellent trial lawyer. What really set Cameron apart, however, was the thoughtfulness of his participation in classroom lectures. In addition to being thoroughly prepared for each class, Cameron demonstrated himself to be a deep and complex thinker. The views he expressed during lectures were never superficial; they always reflected serious thought, introspection, and preparation. Cameron was also an excellent listener, readily incorporating new information that I provided as well as opinions that his classmates expressed. Cameron never assumed that his initial views were right. Instead, he consistently sought to test and challenge his initial views to determine whether they could stand up to scrutiny and, if they could not, how they should be modified.

Cameron was beloved by his classmates. Cameron certainly enjoyed debating with me and his classmates during lectures, but these debates were always collegial, respectful, and enjoyable. Cameron fully and honestly listened to the other members of the class. He clearly honored and recognized the value of his classmates' diverse opinions, which in turn earned him the respect and admiration of his classmates. I have no doubt that Cameron would take this same approach in your chambers. In short, I am confident that Cameron would be an outstanding judicial clerk, both culturally and intellectually.

Please do not hesitate to reach out if you would like to speak with me about Cameron. Thank you for considering his application.

Sincerely,



Aaron M. Katz

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Cameron Campbell for a clerkship with you. I'm the Director of Advocacy Programs at Boston University School of Law. I supervise the Law School's competition programs and coach our competition teams. Therefore, I have worked closely with Cameron for two years in connection with moot court and mock trial and have watched him actively building on his strengths to excel in both areas.

During Cameron's first year of law school, despite having not yet taken Evidence or Trial Advocacy, he competed in the National Trial Competition, hosted by the Texas Young Lawyers Association. At the end of his 1L year, he was elected to the Mock Trial Executive Board as a Vice President of Training. Cameron was integral in encouraging interested first- and second-year law students to participate in mock trial. He volunteered to table at every student org fair, answering questions and supporting students who were nervous about trying something new.

In his second year of law school, Cameron competed in both mock trial and moot court competitions, all while also serving on the Mock Trial board and coaching mock trial teams. Cameron jumped right in during the fall semester by competing in the All-Star National Mock Trial Competition, which took place only weeks into the semester. At the same time, Cameron competed in our fall moot court competition, the Edward C. Stone Moot Court Competition.Cameron drafted an exceptional brief on the question of whether a charge can stand under the first paragraph of 18 U.S.C. § 2113(a) (the Bank Robbery Act) when the government does not allege that the defendant actually used force and violence during the commission of the attempted robbery. His brief was thoroughly researched, expertly structured, and clearly written. His brief score earned him a Best Brief award and in invitation to the Homer Albers Prize Competition, our honors moot court competition.

During the Albers competition, I had the pleasure of watching Cameron drastically improve his already strong oral advocacy skills. More than any of his fellow competitors, Cameron sought feedback. Not only did he sign up for every optional practice slot and attend office hours, he also reached out to each round's judges to request additional critical feedback so that he could further improve. He never became defensive, instead welcoming these critiques. Cameron understands that seeking out and incorporating feedback is integral to growing as an attorney. Cameron and his teammate ultimately advanced through three rounds of arguments to the fourth, semifinal round of the competition. Cameron's facility with the law during oral argument was exceptional. By the later rounds of competition, he was not using any notes, but was always thoughtfully, directly, and thoroughly addressed each judge's unique concerns. This was all the more impressive because Cameron was arguing a challenging and sensitive issue: whether the Second Amendment protects the right of undocumented persons to possess firearms. Unsurprisingly, Cameron's written work was again outstanding; his team received the award for Best Petitioner Brief in the competition.

Moreover, Cameron continued his involvement in mock trial while competing in Albers. First, while drafting his award-winning Albers brief, he coached a team at the National Trial Competition. Second, while competing in the Albers oral arguments, he was preparing to compete in the inaugural Crimson Cup Mock Trial Competition, which took place just two weeks after his Albers work ended. As Team Captain, Cameron was responsible for guiding his team to a successful fourth-place finish in the competition, while he was awarded Best Advocate in the competition. I believe Cameron's success in the Crimson Cup encapsulates his character: He is someone who can expertly coach and support first-year law students to success all while achieving success himself.

Finally, based both on Cameron's excellent research and writing skills and his ability to support and mentor other law students, I encouraged him to apply to be a student director of the Albers Competition during his 3L year. I am looking forward to working with him next year in that role. On a personal note, I enjoy working with Cameron. He is a top-notch legal analyst who truly enjoys the law. I believe that Cameron's particular strengths—his enthusiasm for the law, his facility with analysis, and his ability to clearly convey information—will make him an excellent law clerk. Therefore, I strongly recommend him for the position. Please contact me if you have any questions about his application.

Very truly yours,

Jennifer Taylor McCloskey, Esq.
Director, Advocacy Programs

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Cameron M. Campbell

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Writing Sample

I prepared the attached writing sample for Boston University's 2023 Homer Albers Prize Moot Court Competition, for which my partner and I received an award for Best Brief. The matter at issue involved the search and subsequent arrest of Andrea Torres-Menjivar, an undocumented resident of the fictitious state of Albers, for carrying a firearm unlawfully in violation of 18 U.S.C. § 922(g)(5)(A). I argued in support of petitioner Torres-Menjivar's motion to dismiss on the grounds that the above statute was an unconstitutional violation of her Second Amendment right to keep and bear arms. The Supreme Court's decision in United States v. Rahimi was published after the Albers problem was released, and is therefore not included in the Second Amendment analysis below.

ARGUMENT

I. 18 U.S.C. § 922(g)(5)(A) IS AN UNCONSTITUTIONAL INFRINGEMENT ON TORRES-MENJIVAR'S FUNDAMENTAL RIGHTS BECAUSE THE PROTECTIONS OF THE SECOND AMENDMENT APPLY IN FULL FORCE EVEN TO NONCITIZENS.

This Court should reverse the lower court's denial of Andrea Torres-Menjivar's motion to dismiss. The statute under which Torres-Menjivar was charged and convicted makes it illegal for any noncitizen unlawfully present in the United States to "possess . . . any firearm or ammunition." 18 U.S.C. § 922(g)(5)(A). However, this statute fails to pass constitutional muster when weighed against one of the rights most fundamental to this nation's history and identity: the right to keep and bear arms codified by the Second Amendment. See McDonald v. City of Chicago, 561 U.S. 742, 767 (2010). Even noncitizens, including those present within the borders of the United States without formal authorization, are entitled to and shielded by the protections of the fundamental rights enshrined in the nation's Constitution. See Plyler v. Doe, 457 U.S. 202, 215 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976).

This umbra of Constitutional protections for noncitizens includes the Second Amendment right to keep and bear arms in self-defense, recognized by this Court as an individual right in 2008 and subsequently incorporated against the States. District of Columbia v. Heller, 554 U.S. 570, 628-29 (2008); McDonald, 561 U.S. at 767-68 (2010); see also United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015) (holding that unauthorized noncitizens nevertheless possess firearm rights under the Second Amendment). This interpretation is supported by both the plain language of the Constitution itself and the patterns of history, tradition, and jurisprudence surrounding the Second Amendment and its implementation.

Moreover, even if the language of the Second Amendment fails to cover unauthorized noncitizens in every possible circumstance, Torres-Menjivar herself has nevertheless developed

such extensive "substantial connections" to the nation, as set forth in United States v. Verdugo-Urquidez, that she merits the full protections of the Constitution. 494 U.S. 259, 265 (1990).

In addition, because Torres-Menjivar and her fellow noncitizens do possess a fundamental right to bear arms, the constitutionality of any statute attempting to restrict those rights falls into question. See Heller, 554 U.S. at 635. N.Y. State Rifle & Pistol Ass'n v. Bruen requires the Government to affirmatively demonstrate that the statute at issue conforms with "the Nation's historical tradition of firearm regulation" when weighed against the "unqualified command" of the Second Amendment. 142 S. Ct. 2111, 2129-30 (2022).

Even if this Court chooses instead to conduct a more traditional means-end scrutiny test, the Government nevertheless fails to adequately establish that the statute is so essential to the public function of the State as to justify excluding noncitizens. See Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982). Therefore, 18 U.S.C. § 922(g)(5)(A) unconstitutionally infringes on the Second Amendment rights of unauthorized noncitizens, including Torres-Menjivar, and this Court should accordingly grant Torres-Menjivar's motion to dismiss.

A. The plain language, prior jurisprudence, and historical context of the Second Amendment indicate that the scope of "the people" encompasses noncitizens as well as citizens.

The Second Amendment to the United States Constitution guarantees that "the right of the people to keep and bear Arms . . . shall not be infringed." U.S. Const. amend. II. This Court's recent decisions in Heller and McDonald further clarify that this right belongs not only to American communities writ large, but also to any individual seeking to use firearms in self-defense both within and outside the home. 554 U.S. at 581; 561 U.S. at 767 (holding that Second Amendment right was "fundamental" to nation's order and liberty). This fundamental right, along with the other protections of the Bill of Rights, cannot and should not be limited exclusively to citizens; all those who call this nation home are entitled to defend themselves and

their loved ones from harm. See United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012) ("[W]hy exactly should all aliens who are not lawfully resident be left to the mercies of burglars and assailants?").

1. No explicit Supreme Court precedent exists for how or whether the Second Amendment should apply to noncitizens.

This Court has thus far been silent on which categories of people merit the protections of the Second Amendment. The majority in Heller referred variously to "the political community," "all Americans," "citizens," and "the people," without clarifying which of those terms, if any, best delineated the Amendment's precise scope. 554 U.S. at 580, 581, 595. Nor does it even purport to address these secondary questions: whether and how the Second Amendment applies to noncitizens was "not part of the calculus." Huitron-Guizar, 678 F.3d at 1168; see also Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015). Nevertheless, the language of Heller and the context of its analysis provide us with a valuable starting point from which to conduct a more detailed analysis of the Second Amendment rights of noncitizens.

2. The language of Heller and Verdugo-Urquidez suggests that the rights of "the people" in the Second Amendment are not exclusive to citizens.

Although Heller refers at times to the rights of "citizens" or "Americans," these are not terms of art, and should not be understood to exclude immigrants. See Huitron-Guizar, 678 F.3d at 1168; see also Meza-Rodriguez, 798 F.3d at 669 (citing Heller, 554 U.S. at 625) (holding that language of Heller was not exhaustive attempt to delimit scope of "people" in Second Amendment). In fact, the Court in Heller cautions against construing the scope of "the people" too narrowly, emphasizing that the term refers to "all members of the political community" rather than an "unspecified subset." 554 U.S. at 580. The Heller majority also relied on Verdugo-Urquidez, a Fourth Amendment analysis from a decade prior which attempted to more rigorously

define the meaning of "the people" in that context. 494 U.S. at 265. This reliance suggests that the definition laid out in Verdugo remains dispositive for Second Amendment questions.

Verdugo-Urquidez in turn suggests that the meaning of "the people" remains consistent throughout the First, Second, and Fourth Amendments, a comparative analysis echoed by the Heller majority. Id.; see also Heller, 554 U.S. at 592 (analogizing First, Second, and Fourth Amendments as codifiers of pre-existing rights). The Court characterizes "the people" as encompassing both those who "are part of a national community" and those who "have otherwise developed sufficient connection with this country." Verdugo-Urquidez, 494 U.S. at 265.

In fact, Verdugo-Urquidez goes further still: it explicitly specifies that the above definition includes noncitizens and establishes a two-part test for determining whether those noncitizens satisfy the "sufficient connection" standard set forth above: noncitizens are included in "the people" if they (1) are present in the United States voluntarily, and (2) have accepted "some societal obligations." Id. at 271, 273. Justice Kennedy's concurrence suggests that the scope of "the people" may well be broader still, and that the language of the Bill of Rights was intended to be inclusive rather than exclusive. Id. at 276 (Kennedy, J., concurring). But neither Heller nor Verdugo-Urquidez, preoccupied as they are with broader Constitutional questions, yield a conclusive answer with regards to the Second Amendment's treatment of noncitizens.

3. This Court's historic treatment of the other amendments of the Bill of Rights consistently emphasizes that even noncitizens are entitled to a wide array of Constitutional protections.

This Court has long emphasized that the protections of the Bill of Rights are not limited exclusively to citizens: mere alienage alone cannot erode an individual's inherent rights. Yick Wo v. Hopkins, 118 US 356, 368 (1886). This Court's treatment of other similar amendments provides a useful lens through which to clarify the scope of the right to bear arms. Because the first ten amendments were added to the Constitution simultaneously, identical words and phrases

shared among those amendments should also share a consistent meaning. See Meza-Rodriguez, 798 F.3d at 670; see also Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007); Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986) (emphasizing that identical words ought carry identical meaning throughout statute or constitution).

This Court has consistently held that even noncitizens are entitled to the fundamental rights of due process, representation, and trial by jury. See Wong Wing v. United States, 163 U.S. 223, 238 (1896). Those rights further extend even to those "whose presence in this country is unlawful, involuntary, or transitory." Mathews, 426 U.S. at 77. The same holds true for the Fourth Amendment's protection against illegal searches and seizures. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984) (ascribing Fourth Amendment rights to undocumented appellees); see also Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

In each of these prior decisions, the Court has held that the fundamental Constitutional rights that guarantee individuals due process of law and protect them from unjust encroachment on their property and persons apply even to noncitizens. The Second Amendment, like the Fourth Amendment, falls into the latter category, and it would be inconsistent to the point of absurdity to claim that noncitizens are entitled to only one such set of rights and not the other. See Huitron-Guizar, 678 F.3d at 1168 ("It would require us to hold that the same 'people' who receive Fourth Amendment protections are denied Second Amendment protections, even though both rights seem at root concerned with guarding the sanctity of the home against invasion.").

The plain language of the amendment itself, coupled with this Court's treatment of both the Second Amendment itself and the rest of the Bill of Rights writ large, supports the ascription of the right to bear arms even to noncitizens. Those circuits that have opposed the Second Amendment rights of noncitizens have chiefly done so on the weight of Heller's reference to

"law-abiding, responsible citizens," and its exclusion of felons and the mentally ill. 554 U.S. at 626, 635. They contend that unauthorized entry to and presence in the United States renders noncitizens neither "law-abiding" nor "responsible," thereby excluding them from the "people" of the Second Amendment. United States v. Carpio-Leon, 701 F.3d 974, 975 (4th Cir. 2012).

However, this attempt to falsely equate unauthorized noncitizens with felons and other serious wrongdoers falls short in several respects. Despite the recent increase in popular animus towards unauthorized noncitizens, neither entering the country improperly nor remaining within its borders while unauthorized is or has ever been a felony offense. 8 U.S.C. § 1325; see also Meza-Rodriguez, 798 F.3d at 673. In fact, Congress actively declined to elevate unauthorized entry to the level of a felony when the Senate rejected H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. 109th Cong. § 203(2)(D) (2005).

In Carpio-Leon, the Fourth Circuit turns to United States v. Moore in an attempt to demonstrate that Nicolas Carpio-Leon's immigration violation constituted conduct just as unlawful as that of the appellee in Moore, and therefore did not deserve the protections of the Second Amendment. 701 F.3d at 981 (citing Moore, 666 F.3d 313, 319-20 (4th Cir. 2012)). Moore, however, had prior felony convictions for drug offenses, robbery, and multiple assaults with a deadly weapon; in contrast, Carpio-Leon's only crime was entering the country without authorization. Compare Moore, 666 F.3d at 315, with Carpio-Leon, 701 F.3d at 975.

The Fourth Circuit itself had two years earlier held that even convicted domestic abusers were entitled to the protection of the Second Amendment, albeit at a diluted level of scrutiny, despite the acknowledged fact that "domestic abusers often commit acts that would be charged as felonies if the victim were a stranger." United States v. Chester, 628 F.3d 673, 690 (4th Cir. 2010) (Davis, J., concurring). By every legal and moral metric, violent domestic abuse is conduct

far more heinous than the simple transgression of an unauthorized border crossing; why then should perpetrators of the former retain their rights while the latter languish without?

In addition, after the Seventh Circuit held in Meza-Rodriguez that noncitizens are entitled to the protection of the Second Amendment, subsequent circuits confronted with similar cases have circumvented the Constitutional question entirely, opting to assume the existence of noncitizens' Second Amendment rights without deciding. See Perez, 6 F.4th at 453; United States v. Torres, 911 F.3d 1253 (9th Cir. 2019). This further suggests that the act of unauthorized entry, by itself, does not foreclose a noncitizen's access to the right to bear arms.

4. In this case, Torres-Menjivar has established sufficient connections to our nation's community under the Verdugo-Urquidez test and is therefore protected by the Second Amendment.

Even if this court finds that noncitizens are not entitled to Second Amendment rights in all circumstances, Torres-Menjivar nevertheless displays sufficient connections to the United States to merit the protections of the Second Amendment. The two-part test set forth in Verdugo-Urquidez provides the best standard for assessing those connections. 494 U.S. at 273.

First, Torres-Menjivar was present in the country voluntarily. See id. Although she initially entered the United States as a minor, Torres-Menjivar has called the state of Albers home ever since, and has chosen to remain in the country with her family for twenty-six years: a clear indicator of voluntary residence. See Meza-Rodriguez, 798 F.3d at 666 (noting that appellee has remained in United States since his arrival at age four or five). She is also the primary caretaker of her grandmother, who suffers from diabetes and dementia. [R. 2].

Torres-Menjivar has also accepted enough societal obligations to qualify as a part of the national community. See Verdugo-Urquidez, 494 U.S. at 273. During her time in the United States, Torres-Menjivar attended public school, participated in sports, and received a valid driver's license. [R. 2-3]. She volunteers her time at a local women's shelter. [R. 3]. She does not

have a prior criminal record, or even so much as a single outstanding traffic fine. [R. 3]. Neither her noncitizen status nor the unauthorized nature of her residence in the country negates these connections. See id. at 671. In this case, Torres-Menjivar has cultivated the necessary connections. See id. (holding that attendance of public schools, close relationships with family members, and history of local work rose to level of "substantial connections").

B. 18 U.S.C. § 922(g)(5)(A) unjustly infringes on the constitutional right of unauthorized noncitizens to keep and bear arms for self-defense.

If this Court determines that unauthorized noncitizens such as Torres-Menjivar are entitled to the protections of the Second Amendment, it should then assess whether the statute at issue infringes on those protections to an unconstitutional extent. See Bruen, 142 S. Ct. at 2125.

1. Weighing the plain text of the Second Amendment against this country's history of firearms regulation correctly avoids the inherent ambiguity of a means-end scrutiny analysis.

In Bruen, this Court indicated that subjecting a statute that infringed on an individual's Second Amendment rights to a pure means-end scrutiny test, preferring instead to circumvent that analytical quagmire entirely. Id. at 2129 (observing that Heller had conducted historical and textual analysis, not means-end test, to assess scope of Second Amendment right and answer questions of constitutionality). When subjected to such a reading, the Government bears the burden of showing that the statute comports with the nation's traditions of firearms regulation, when weighed against the presumptive protection of the Second Amendment. See id. at 2129-30.

In this case, the Government has not demonstrated any such alignment with prior regulatory tradition: they merely claim a general interest in constraining the behavior of potential bad actors without presenting any specific evidence pertaining to the actual benefits of the statute, its alternatives, or legislative history. This unsubstantiated insistence fails to in any way surmount a right as essential as that enshrined by the Second Amendment.

1. Even under intermediate scrutiny, the Government fails to justify the extent to which the statute at issue infringes on the Second Amendment.

Should this Court instead determine that the record in this case is sufficiently distinct from Bruen to merit a more conventional means-end scrutiny analysis, the statute at issue still fails to survive any level of scrutiny.

Even Congress lacks the power to simply override the entire body of Second Amendment rights without a substantive demonstration that its proposed restrictions are the only effective regulatory option. See Perez, 6 F.4th at 460-61 (Menashi, J., concurring in the judgment). Merely alleging a general interest in public safety, as the Government has done in this case, is insufficient without actual proof. There exists scant evidence that unauthorized noncitizens are more prone to illegal activities generally or firearm violations in particular: the Government's assertions are entirely unsupported by tangible data. See Meza-Rodriguez, 798 F.3d at 673. In fact, the lion's share of scholarship on the issue suggests that noncitizens and especially undocumented persons are orders of magnitude less likely to cause incidents of gun violence.

In 1973, this Court held that barring noncitizens from the practice of law violated their right to equal protection. See In re Griffiths, 413 U.S. 717, 725 (1973) (holding that Government could adequately control and monitor professional fitness of prospective lawyers without imposing wholesale ban). Firearm owners, like lawyers, are subject to both an initial vetting process and subsequent scrutiny and control; the state possesses a myriad of regulatory tools to satisfy its public safety interest without removing the firearm right entirely. Because those reasonable alternatives exist, the state's public safety argument does not justify a categorical ban.

Therefore, 18 U.S.C. § 922(g)(5)(A) is an unconstitutional violation of the Second Amendment rights of unauthorized noncitizens currently residing in the United States, including Torres-Menjivar, and this Court should grant her motion to dismiss.

Applicant Details

First Name	**Robert**
Middle Initial	**K**
Last Name	**Carpenter**
Citizenship Status	**U. S. Citizen**
Email Address	**carpenterr2024@lawnet.ucla.edu**
Address	**Address** Street **10401 Wilshire BLVD, Apt 401** City **Los Angeles** State/Territory **California** Zip **90024** Country **United States**
Contact Phone Number	**6508617405**

Applicant Education

BA/BS From	**Haverford College in Pennsylvania**
Date of BA/BS	**May 2018**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 10, 2024**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**UCLA Journal of Law & Technology**
Moot Court Experience	**Yes**
Moot Court Name(s)	**UCLA Law Skye Donald Moot Court Competition (2022)** **UCLA Law Spring Internal Moot Court (2023)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Motomura, Hiroshi
Motomura@law.ucla.edu
(310) 206-5676

Marcus, David
marcus@law.ucla.edu

Langer, Maximo
langer@law.ucla.edu
(310) 825-8484

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Robert Kory Carpenter
10401 Wilshire Boulevard, Apt. 401, Los Angeles, CA 90024
(650) 861-7405 | CarpenterR2024@lawnet.ucla.edu

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court
for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

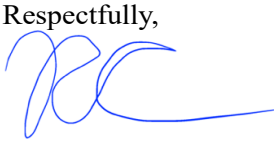
I am a rising third-year student at UCLA School of Law, where I am an Articles Editor of the *UCLA Journal of Law and Technology* and a member of the UCLA Law Moot Court Honors Board. I am respectfully applying for a clerkship with your chambers for the 2024–2025 term.

My desire to clerk stems from my interest in legal research and writing, and my experience working as a paralegal prior to law school. In my first year of law school, I realized that I have a passion for communicating complex concepts in a way that is clear and easy for my audience to understand, and I have pursued my passion for writing and oral advocacy at UCLA Law. I was honored to be selected as a member of the Moot Court Honors Board and an Articles Editor for the *UCLA Journal of Law and Technology*, and I look forward to continuing to hone my oral advocacy and writing skills.

On the experiential side, my work as a paralegal assisting a special counsel investigation into the State of New Jersey's corporate tax incentive program strengthened my desire to clerk in your chambers. Not only did I enjoy traveling around New Jersey for witness interviews, but I also appreciated the process of uncovering the truth and presenting our findings to the public in a written report. The experience strengthened my desire to contribute to the judicial process as a clerk and, in the long term, to pursue a career in public service, ideally as a prosecutor.

Enclosed please find my resume, unofficial law school transcript, and writing sample. In addition, I have attached letters of recommendation from Professor Hiroshi Motomura (motomura@law.ucla.edu, (310) 206-5676), Professor David Marcus (marcus@law.ucla.edu, (310) 794-5192), and Professor Máximo Langer (langer@law.ucla.edu, (310) 825-8484). I am available at your convenience and would be privileged for the opportunity to interview with you. Thank you very much for your consideration.

Respectfully,



Robert Kory Carpenter

Robert Kory Carpenter

10401 Wilshire Boulevard, Apt. 401, Los Angeles, CA 90024
(650) 861-7405 | CarpenterR2024@lawnet.ucla.edu

EDUCATION

UCLA School of Law, Los Angeles, CA
Juris Doctor expected May 2024 | GPA: 3.458
Honors: Leveton Memorial Scholarship
Journals: UCLA Journal of Law and Technology, *Articles Editor*
Moot Court: Moot Court Honors Board, *Problem Developer*
1L Skye Donald Moot Court Competition, *Judge* | Moot Court, *Participant*
Activities: UCLA Law Fellows, *Mentor* | UCLA Law Run Club, *Member*

Haverford College, Haverford, PA
Bachelor of Arts, History, May 2018 | GPA: 3.513
Honors: Andrew Silk Summer Scholarship | Centennial Conference Academic Honor Roll (3 of 3 years)
Activities: Men's Varsity Lacrosse Team | Transfer Student Resource Person

EXPERIENCE

U.S. Securities and Exchange Commission San Francisco, CA
SEC Legal Intern, Division of Enforcement Summer 2023

FINRA Los Angeles, CA
Legal Extern, Department of Enforcement Summer 2022

- Drafted memoranda of law in support of formal disciplinary actions
- Performed factual and legal research in preparation for on the record interviews
- Crafted summaries of deposition transcripts and other evidence for use in complaints and hearings

Walden Macht & Haran LLP New York, NY
Paralegal Specialist April 2019 – June 2021

Task Force Investigation into Improperly Awarded Tax Incentives

- Cite-checked, proofread, and prepared exhibits for three reports presenting findings to the public
- Attended witness interviews and memorialized findings
- Organized and contextualized relevant documents and facts within case chronologies

Fraudulent Invoice Litigation

- Assisted with drafting of legal briefs for federal litigation against construction vendors who used fraudulent invoices to double charge the firm's clients
- Prepared and introduced hundreds of documents during ten depositions taken over a month
- Managed creation and maintenance of e-discovery database containing thousands of case documents

Court Filing Responsibilities

- Filed court documents for legal proceedings in U.S. District Courts, New York State Supreme Court, and New Jersey Superior Court
- Monitored judges' and jurisdictions' local rules to ensure case filings were compliant

Unified Social New York, NY
Digital Campaign Coordinator September 2018 – February 2019

- Executed advertising campaigns across major social media platforms for Toyota and AT&T
- Drafted weekly client reports that identified successes and opportunities for improvement

MAXSA Innovations Fairfax Station, VA
Marketing Intern Summer 2017

- Implemented search engine optimization (SEO) strategies to improve MAXSA products' position in Amazon.com search results
- Ran paid search word campaigns on Amazon Marketing Services that doubled one product's sales

INTERESTS

Running, museums, movies, foreign affairs, music, and San Francisco 49ers Football

University of California, Los Angeles
LAW Student Copy Transcript Report

Student Information

Name:	CARPENTER, ROBERT K
UCLA ID:	405682806
Date of Birth:	04/26/XXXX
Version:	08/2014 | SAITONE
Generation Date:	June 03, 2023 | 06:32:06 PM This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021

SCHOOL OF LAW

Major:
LAW

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

SAW COMPLETED IN LAW 658, 22F

Previous Degrees

None Reported

California Residence Status

Resident

Fall Semester 2021

Major:
LAW

CONTRACTS	LAW 100	4.0	12.0	B
INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP
Multiple Term - In Progress				
PROPERTY	LAW 130	4.0	13.2	B+
CIVIL PROCEDURE	LAW 145	4.0	13.2	B+

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	38.4	3.200

Spring Semester 2022

LGL RSRCH & WRITING	LAW 108B	5.0	15.0	B
End of Multiple Term Course				
CRIMINAL LAW	LAW 120	4.0	14.8	A-
TORTS	LAW 140	4.0	13.2	B+
CONSTITUT LAW I	LAW 148	4.0	12.0	B
IMMIGRATION POLICY	LAW 165	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	55.0	3.235

Fall Semester 2022

BUSINESS ASSOCIATNS	LAW 230	4.0	14.8	A-
IMMIGRATION LAW	LAW 331	4.0	16.0	A
HUMAN RGTS WAR CRIM	LAW 658	3.0	12.0	A
MEDIATION	LAW 707	4.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	15.0	15.0	42.8	3.891

Spring Semester 2023

EVIDENCE	LAW 211	4.0	13.2	B+
FEDERAL COURTS	LAW 212	3.0	9.9	B+
GLBL PRSPTV CRM PRO	LAW 614	3.0	12.0	A
INTERNL INVESTGN	LAW 737	3.0	12.0	A

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	47.1	3.623

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	6.0	6.0	N/a	N/a
Graded Total	53.0	53.0	N/a	N/a
Cumulative Total	59.0	59.0	183.3	3.458

Total Completed Units 59.0

Memorandum

RESIDENCE ESTABLISHED 08-10-2022

END OF RECORD
NO ENTRIES BELOW THIS LINE

UCLA School of Law

HIROSHI MOTOMURA
SUSAN WESTERBERG PRAGER DISTINGUISHED PROFESSOR OF LAW
FACULTY CO-DIRECTOR, CENTER FOR IMMIGRATION LAW AND POLICY

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-5676
Email: motomura@law.ucla.edu

May 16, 2023

Dear Judge:

I write this letter to offer a strong recommendation on behalf of Robert Carpenter for a clerkship in your chambers.

I've had consistent contact with Rob since the spring of 2022. It was the spring semester of his first year at the UCLA School of Law, and he was enrolled in my course on Immigration Policy in a Contentious Age. Then, in fall 2022, Rob took my Immigration Law course. Since we first met, he has reached out to meet with me on a regular basis to talk about course material as well as general questions about his career plans and current events.

Rob is an impressive student, very thoughtful and very analytical. This became clear in the spring 2022 Immigration Policy course. This was a small-group first-year elective, with 20 students and entirely based on discussion of readings on current policy issues. Students wrote short papers in reaction to the readings and then engaged in robust discussion during each session. Rob stood out as especially thoughtful in both his writing and his contributions to our class discussions. I was especially impressed by his willingness to raise questions about various forms of conventional wisdom that can hamper honest discussion of immigration policy. It was typical of him to ask a question that probed a very basic assumption that others had been making without the degree of thought that the assumption actually deserved.

In my Immigration Law course – a challenging four-unit course that included close attention to complex statutes, constitutional doctrine, and the practical challenges of client counseling, Rob continued his pattern of thoughtful questions and insightful contributions. In the group of about 65 students, he stood out. Outside the classroom, Rob took the time to come to office hours to discuss the material more deeply that had been possible in class. On those occasions, I appreciated his observations about my approach to teaching and about the flow of group discussions.

Rob earned a solid "A" in Immigration Law. This was entirely consistent with his classroom performance and the many conversations that we had about the material. The first-year elective on Immigration Policy was a pass/no-pass course without grading, but he was outstanding in that setting, too. And I know from his short papers in Immigration Policy that he is a strong writer. (Immigration Law did not call for any writing other than the final exam.)

Rob will be an excellent judicial clerk. He is very strong academic, and you will find that he is a delightful person.

Please contact me if I can provide any further information.

Sincerely,

Hiroshi Motomura
Susan Westerberg Prager Professor of Law
Faculty Co-Director, Center for Immigration Law and Policy

UCLA School of Law

DAVID MARCUS
VICE DEAN FOR CURRICULAR AND ACADEMIC AFFAIRS
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 794-5192
Email: marcus@law.ucla.edu

May 30, 2023

Dear Judge,

I write this letter in support of Rob Carpenter's application to clerk in your chambers. Rob is a bright, hardworking, and deeply engaged student. He matches his passion for the law with unusual grit and effort. Rob would be a terrific clerk, and I highly recommend him.

Rob was one of eighty-eight students in my Fall 2021 Civil Procedure course. I admit that, in a course of that size, I usually cannot get to know every student well. But the Fall 2021 semester was special. The first day of classes was the first day most of the students had engaged in any in-person pursuit of any substance since the pandemic's start. The students were unusually interactive and enthusiastic. Also, some students, even in a group of close to one hundred, stand out from Day 1. This was so with Rob. From the start of the semester, he volunteered fearlessly and frequently, often multiple times per class. Rob was not a gunner and did not volunteer just to grab the spotlight. Rather, Rob offered comments when the material grabbed him, something that happened often. I could tell, as invariably when Rob raised his hand he would follow up with a lengthy conversation after class.

Rob performed quite well in my class, earning a B+ on the final exam. Please appreciate that UCLA Law has an unusually rigorous curve. Students who earn B+ grades at UCLA often would rank higher at schools that give instructors more permission to award grades that better match overall performance.

You will note that Rob's grades have followed an impressive upward trajectory. He and I met at the start of his 2L year last August. Rob, clearly upset, wondered why his deep investment in his coursework was not paying off, in terms of his grades, to the extent he had hoped. We spoke for some time, and I recommended a couple of strategies, including regular visits to his professors' office hours. Rob and I connected a couple of times during the fall semester, and he mentioned that he was giving my advice a go. I was really delighted to learn that Rob aced the fall semester of his 2L year, earning A or A- grades across the board.

I cannot claim credit, as I know that Rob worked incredibly hard. But I am glad that he saw the returns from not giving up and instead doubling down on his studies. To my mind, acceleration in law school matters as much – if not more – than velocity. A student who stumbles a bit out of the gate, then steadily improves, not only demonstrates aptitude and intelligence. The student also demonstrates grit, effort, and perseverance.

Rob continued to persevere admirably this spring semester. He took my Federal Courts course, a notoriously difficult subject and one that tends to attract the school's real law junkies. In many ways,

Rob turned in a repeat performance, volunteering as he did in Civil Procedure with insightful comments and precise and helpful clarifying questions. He also gave me a taste of my own medicine, coming to office hours every week, without fail, for the entirety of the time I had available. (I joke about the "own medicine" bit – I was delighted to have Rob stop by.) Each week he scrupulously reviewed readings and class notes, then came to office hours with a list of terrific questions that got immediately to the heart of what made the material complicated and interesting. Rob also stayed while others asked questions and often chimed in even if the subject strayed from what he had prepared. His effort and passion were really impressive.

I have not yet seen Rob's grade, as grading is anonymous at UCLA and I have not yet received the class roster matching the grades I turned in with names. I do not need to know this result, however, to know that Rob succeeded fulsomely in the course. Based on our regular conversations over the course of the semester, Rob surely mastered a huge amount of complex material.

I have not supervised Rob's writing, so I cannot comment directly on his capacity to carry out a large-scale research project. But I have reviewed several exemplars of Rob's writing, and they are very strong. One, a brief written for a moot court competition, demonstrates Rob's facility with practice-oriented legal writing. He has developed a precocious ability for this genre. Rob makes punchy, concise arguments that use authority effortlessly and persuasively. He has a particular knack for the sort of subtly clever ways that good lawyers shade what seems like otherwise objective writing in a persuasive direction. Consider the first sentence of his brief: "Petitioner Squabble, Inc. (the "Platform") asks the Court to overturn a valid act of the California State Legislature aimed at reigning in social media platforms that censor public speech in inconsistent and partisan ways." This sentence does not include any extreme or inflammatory language, yet it is immediately evident which side Rob represents and how he believes the court should rule.

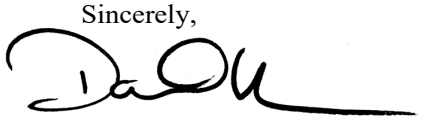
I have also reviewed a terrific paper Rob wrote for a seminar on comparative criminal procedure. In it, Rob shows how rigidity in Canadian immigration enforcement regimes has tended to generate discretion in criminal prosecution, following a trajectory familiar to the United States. Canadian and American immigration systems have evolved to deny noncitizens convicted of criminal offenses any possible relief from deportation. The lack of any escape valve for sympathetic situations has pushed both criminal justice systems to soften, to reach outcomes that can enable sympathetic defendants to avoid the immigration regime's harsh inflexibility.

Rob's paper is elegant, well-researched, and unusually thorough for a seminar paper. It too demonstrates Rob's strength as a writer – to-the-point, concise prose and a clear, easy-to-follow overall organization.

Rob's strengths as a student and lawyer-to-be are clear. So too are his strengths as a person. Rob is kind, respectful, and good humored. He enjoys the evident affection of his classmates. Rob looks for ways to help others. He is simply a terrific guy.

You would have a terrific term with Rob in your chambers. He is passionate about the law, exceptionally diligent, and dedicated. He has all the smarts necessary to produce truly top-flight work, and his judgment and work ethic are first-rate. I highly recommend Rob and hope you will give his application close scrutiny.

Sincerely,



David Marcus

UCLA School of Law

MAXIMO LANGER
DAVID G. PRICE & DALLAS P. PRICE PROFESSOR OF LAW
DIRECTOR OF THE TRANSNATIONAL PROGRAM ON CRIMINAL JUSTICE

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BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 825-8484
Email: langer@law.ucla.edu

June 5, 2023

Dear Judge:

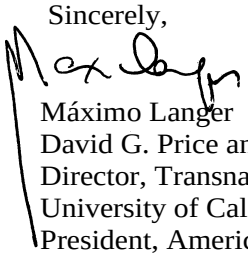
I am writing this letter to express my strong support of Robert Carpenter's application for a clerkship with your chambers. Robert is smart, hardworking, a strong and clear writer, and collegial. In addition, he has prior experience as a legal intern and extern—experiences that will be very valuable as a law clerk—and is very interested in doing a clerkship with you. He will be an excellent law clerk.

Rob took my first-year Criminal Law course and my Global Perspectives on Criminal Procedure seminar at UCLA School of Law. He was an excellent student in both classes. In a big class like Criminal Law, he was always prepared for class, worked hard, showed a clear understanding of the subject matter, and was very thoughtful in his responses to my questions when I called on him in class. In addition, his final exam showed he writes well, even under time pressure. On top of these attributes, in Global Perspectives on Criminal Procedure he also demonstrated his great research abilities and his creativity in his final paper. He wrote on the relationship between plea bargaining and sentencing and immigration removal proceedings in Canada and the United States, applying to this topic a concept developed for a different context. In both classes, Rob also showed that he is passionate and takes interest in his work and is always very collegial with his classmates and with me.

Rob also has prior work experience that will be an asset for the work with you. Last summer, he worked as a legal extern in the Department of Enforcement of the Financial Industry Regulatory Authority. And this summer, he is working as a legal intern in the Division of Enforcement of the U.S. Securities and Exchange Commission. His exposure to law runs even longer since he was a paralegal for over two years at a law firm before coming to law school.

Please do not hesitate to call me (my cellular phone is 310-948-6362) if you need further references or would like to talk more about him.

Sincerely,



Máximo Langer
David G. Price and Dallas P. Price Professor of Law
Director, Transnational Program on Criminal Justice
University of California, Los Angeles School of Law
President, American Society of Comparative Law
Member, American Law Institute

Robert Kory Carpenter
10401 Wilshire Boulevard, Apt. 401, Los Angeles, CA 90024
(650) 861-7405 | CarpenterR2024@lawnet.ucla.edu

WRITING SAMPLE

The attached writing sample is a brief I created for a UCLA Law Moot Court competition in spring 2023. The case involved the constitutionality of a hypothetical state statute that bars social media companies from censoring users' speech on their platforms. The problem is adapted from several cases currently pending before the U.S. Supreme Court, and competitors were not allowed to review authorities outside of a closed universe of caselaw. I represented respondents, the State of Califflorida and a journalist who had been removed from a social media platform called Squabble.

THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2023

DOCKET NO. 2022-2023

Squabble, Inc.,

Petitioner,

v.

Arthur Calypso and Indigo Katz,

Respondents.

ON WRIT OF CERTIORARI TO THE

FOURTEENTH CIRCUIT

Brief for Respondent

R22

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Cases

CONSTITUTIONAL PROVISIONS AND RULES

QUESTIONS PRESENTED

Whether HB 3420, which restricts a social media company's ability to censor content by Califflorida users and journalists, violates Squabble's First Amendment Right to freedom of speech?

OPINIONS BELOW

Calypso v. Squabble, Inc., 22 F.3d 123 (14th Cir. 2022)

INTRODUCTION

Petitioner Squabble, Inc. (the "Platform") asks the Court to overturn a valid act of the Califflorida State Legislature aimed at reining in social media platforms that censor public speech in inconsistent and partisan ways. Squabble purports to be both a content curator and voiceless "interactive computer service provider." The Platform is open to the public, allowing users from around the world to express themselves and communicate with friends. While ninety-nine percent of content uploaded to Squabble instantly appears on the Platform's feeds, in some cases, Squabble blocks user-content containing political views that the Platform deems "false."

More and more in today's society, public debates take place in digital town squares controlled by powerful social media platforms. Although technology advancements have changed where and how people communicate, the Constitution continues to protect people's ability to express themselves freely. This case centers on the new digital town square and asks if legislatures can create regulations that protect freedom of expression on publicly accessible social media platforms that are exacting increasing amounts of control over society. The answer is clear—yes, Califflorida statute HB 3420 is a conduct regulation that does not violate Squabble's First Amendment rights. Rather than interfere with social media platforms' speech, HB 3420 protects social media users' ability to express themselves online. In addition, invalidating HB 3420 would not only contradict the Court's precedents, but it would also give Squabble and other large social media platforms the greenlight to censor views they disfavor. Giving social media platforms such a power would chill political speech across society and hinder the United States' ability to function as a democracy.

HB 3420 is constitutional because it regulates what large social media platforms like Squabble "must do" and "not what they must say." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006) ("*FAIR*"). In addition, HB 3420 does not interfere with Squabble's

ability to express itself by forcing it to respond to user content it does not agree with because it is clear that Squabble's users do not represent the Platform. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 655 (1994) (given cable providers clear role "as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."). Lastly, even if HB 3420 is found to affect speech, the statute is still constitutional because it is content-neutral and any effects on expression are incidental and necessary to promoting the important interest of fostering a vibrant public debate. *FAIR*, 547 U.S. at 67.

STATEMENT OF THE CASE

Petitioner Squabble, Inc. is a social media platform with 1.5 billion users. (R. at 3, 4). The Platform was founded in 2017 as a forum for liberal journalists. (*Id.*). As it grew it pivoted and Squabble now accommodates "voices from across the political spectrum." (*Id.*).

To join Squabble, users must agree to the Platform's Terms and Conditions, which state that the Platform may remove posts containing prohibited content such as "false information" and users who repeatedly post prohibited content. (R at 20). Users must also agree to a liability waiver stating that Squabble is an "interactive computer service provider, and thus not liable for censorship," as set out in 47 U.S.C. § 230(c). (R at 4).

Squabble's three-part content moderation process is unique among social media platforms as it censors "false information" and other content it prohibits before the content populates on users' feeds. (R. at 4). While Squabble trumpets "truth" as its corporate motto, in practice ninety-nine percent of user content passes through the Platform's filtering algorithms "untouched." (R at 3, 4, & 20). While the vast majority of content posts to Squabble feeds immediately after preliminary filtering, the marginal number of posts flagged by the first algorithm are sent through a second more rigorous filtering algorithm. (R at 4). If the content is

also flagged as violative by the second algorithm, it is finally evaluated by Squabble's human review board who determines if the content may be posted on the Platform. (R at 4). But Squabble's content moderation algorithms are inconsistent and often allow prohibited content onto the site. (*Id.*). Squabble has acknowledged that its algorithms can be unreliable and noted that they particularly struggle with foreign language content. (*Id.*).

After a January 2021 newspaper story exposed Squabble's censorship of conservative journalists, Califflorida passed HB 3420, a law that prohibits social media platforms of a certain size from censoring users based on viewpoint. (R at 6). However, the statute leaves platforms' ability to respond through all other means. (*Id.*). HB 3420 applies to all social media sites that operate in Califflorida and either possess more than 100 million users or earn annual gross revenue in excess of $100 million. (R at 20). Squabble easily meets the statute's requirements as the Platform has 1.5 billion users and made $32 billion in the most recent fiscal year. (R at 4).

This litigation arises from Squabble's censorship of conservative journalist Arthur Calypso. On October 14, 2021, Calypso uploaded content to Squabble that the Platform's algorithms flagged as "false." (R at 7). When Calypso learned that the content had been flagged and withheld from his followers' news feeds, he posted a separate statement complaining that the Platform was censoring him and had a misguided understanding of what "truth" means. (R at 7). Calypso's follow-up statement immediately posted to the Platform and Squabble used its own corporate account (username "Squabble") to respond, explaining that Calypso was initially censored because he attempted to post "false information." (R at 7). Upset by the arbitrary explanation and Squabble's attack on his journalistic integrity, Calypso then responded with incendiary language. (R at 7). Squabble then banned Calypso for repeatedly posting prohibited content in the form of the initial censored post and subsequent use of inappropriate language.

In early 2022, Calypso sued Squabble for violating HB 3420 in Califflorida state court. (R at 7). Based on the significant threat social media platform censorship poses to the smooth functioning of democratic society, Califflorida Attorney General Indigo Katz joined the litigation as a co-respondent. (R at 7). Squabble then removed the case to federal court and countersued, claiming that HB 3420 violates its First Amendment rights by forcing it to host content it believes is "false." (R at 7-8). The district court ruled for Squabble but the circuit court reversed, holding that Squabble does not produce expressive speech and thus HB 3420 does not compel the Platform to speak in violation of its First Amendment rights. (R at 11-12). Squabble now appeals to the U.S. Supreme Court.

ARGUMENT

I. HB 3420 Regulates Conduct and does not Interfere with Squabble's Expression

The First Amendment guarantees speakers the ability to choose the content of their own message or to not speak at all. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). The government has the ability to force a person to accommodate third-party speech and the Court has only limited this ability when hosting another person's speech would interfere with the host's message. *FAIR*, 547 U.S. at 63. Third-party speech accommodation laws interfere with a host's expression when they: (1) alter the message conveyed by the host's inherently expressive conduct; or (2) burden the host's ability to communicate its own desired message. *Hurley*, 515 U.S. at 574; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974). On the other hand, the Court has upheld laws regulating non-expressive conduct such as passively transmitting others' content because it does not interfere with any cognizable expression. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994).

A. Squabble's Content Moderation is not Inherently Expressive and does not Communicate any Cognizable Theme or Message

In addition to verbal and written expression, the First Amendment also protects conduct that is inherently expressive such that a reasonable person would recognize that the conduct conveys a coherent message. *See e.g.*, *Hurley*, 515 U.S. at 568-69 (holding that a parade was expressive conduct because each marching unit could be perceived as representing the parade organizer's judgement of what themes deserved celebration). But conduct is not speech just because a person acts with intent to convey a message. *FAIR*, 547 U.S. at 65-66. Instead, the First Amendment only protects conduct that is inherently expressive and conveys an idea that is "overwhelmingly apparent." *Id.* at 66 (quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("*FAIR*"), the Court held that a statute requiring law schools to accommodate military recruiting events did not interfere with the schools' expression because hosting the recruiters did not convey a cognizable message. 547 U.S. at 65-66. The law school plaintiffs argued that the regulation interfered with their speech because they were denying military recruiters access in order to protest the government's homophobic "don't ask, don't tell" policy. *Id.* at 52. The Court held the law schools' practice of excluding military recruiters from their grounds and forcing interviews to nearby undergraduate campuses was not inherently expressive. Specifically, no observer of the law schools' conduct would be able to discern whether the interviews were happening off-campus because a school disagreed with government policy or simply because all of the law school's meeting rooms were occupied. *Id.* at 66. Furthermore, the Court found that the schools' statement explaining their opposition to the policy was separate from the conduct regulated by the law. *Id.* at 64-65. Thus, the statute only regulated non-expressive conduct—hosting military interviews—and did not interfere with the law schools' ability to speak their desired message. *Id.*

Far from the inherently expressive nature of a parade or flag burning, Squabble's content moderation practices resemble the non-expressive conduct at issue in *FAIR*. Squabble's content moderation does not prioritize any type of content and instead allows the vast-majority of content to post unencumbered. Additionally, content that violates Squabble's rules frequently appears on users' feeds because the Platform's content moderation algorithms are unreliable and often fail to filter prohibited content. (R at 4). Thus, it is impossible to decipher if a post made it onto Squabble's feeds because Squabble verified its "truth" or instead because the Platform's algorithms malfunctioned and mistakenly allowed prohibited content onto the site. To this end, the fact that Squabble had to explain to Calypso why his post was removed shows how the Platform's content moderation is not independently expressive. *See id.* at 66 ("that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection.").

In addition, the fact that Squabble exercises minimal editorial discretion while moderating content further emphasizes that the Platform's content moderation is not expressive. In *Turner Broadcasting System, Inc. v. F.C.C.*, this Court held that passively transmitting others' speech without contributing editorial judgment does not constitute expression protected by the First Amendment. 512 U.S. at 655. The *Turner* Court upheld a law requiring cable providers to carry local broadcast channels where the providers operated as "conduit[s] for the speech of others" by transmitting TV programming "on a continuous and unedited basis." *Id*. at 629. Like the cable providers in *Turner*, Squabble largely transmits others' content without making any contributions of its own. Ninety-nine percent of user-content appears on the Platform immediatly after the authoring user presses send and without edits. (R at 4). The difficulty of discerning a coherent message from Squabble's infrequent exercise of editorial discretion is exacerbated by

the massive amount of content posted to the Platform everyday by Squabble's 1.5 billion users. As Squabble exercises minimal influence over what users post to the Platform, any editorial discretion exercised by the Platform is drowned out by the sheer volume of user content that does not relate to any particular theme or message. Accordingly, since Squabble's content moderation does not express any coherent or discernable message it does not constitute speech protected by the First Amendment.

B. HB 3420 does not Compel Squabble to Speak Because User-Content Posted to the Platform is Clearly not Attributable to Squabble

According to *PruneYard Shopping Center v. Robins*, a regulation requiring a person to host another's speech only violates the First Amendment when the accommodated speech is likely to be attributed to the host. 447 U.S. 74, 87 (1980). The threat of attribution to the host constitutes a speech compulsion because it puts pressure on the host to speak in order to dispel the appearance that it agrees with a position that it actually opposes. *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986) ("*PG&E*").

In *PruneYard*, a group of California high-school students sued the owner of a shopping mall for violating their right to free expression by removing them from the property while they were petitioning against a recent United Nations resolution. *Id.* at 77. In holding for the students, the Court reasoned that since the mall "was open to the public" and could easily disclaim visitors' expression by posting signs, it was unlikely that the students' views would be attributed to the mall. *Id.* at 87-88. Accordingly, the state regulation requiring malls to accommodate reasonable visitor expression did not force the mall to clarify that it disagreed with the views expressed by the students because the public nature of the mall made it obvious that visitors do not represent or speak for the mall. *Id.* at 85-88. *But see PG&E*, 475 U.S. at. 1, 15-17 (holding that a regulation requiring a utility company to carry an adverse organization's newsletter in the

excess space of its billing envelopes effectively compelled the utility to speak in order to respond to hostile messages it disagreed with).

Like the mall in *PruneYard*, Squabble is open to the public and invites billions of people to come to the Platform to express themselves. The Platform is not limited to the personal use of Squabble but instead invites "voices from across the political spectrum." (R. at 3). Squabble even refers to itself as a "public space." (R at 5). Thus, Squabble's publicly accessible nature and the multiplicity of diverse views expressed by its users make it unlikely that a user's speech will be attributed to Squabble. Further, Squabble's Terms and Conditions make it clear that anyone can post to the Platform so long as they agree to the Platform's terms. (R at 20). Just as the students' petitioning for signatures in *PruneYard* could not reasonably be credited as spokespersons for the mall's views, Squabble user-content clearly does not represent Squabble. Thus, HB 3420's limitation on Squabble's content censorship does not burden Squabble with the need to clarify that it disagrees with its users because user-content clearly does not represent Squabble.

In addition, Squabble's efforts to distinguish users' speech from its own further emphasizes that users do not speak for the Platform. Squabble can easily disclaim user expression posted on its site and, in fact, Squabble already disclaims responsibility for user-content in section eight of its Terms and Conditions. (R at 7). Specifically, Squabble's Terms and Conditions state that the Platform is an "interactive computer service provider" ("ICSP") as defined to 47 U.S.C.A. § 230 and therefore "is not liable for censorship of content." (R at 20). Section 230 specifically states that ICSPs are not considered the publisher or speaker of any content posted by others on an online platform for purposes of legal liability. 47 U.S.C.A. § 230(c)(1). In addition to informing every user that it disclaims their speech through its reference to section 230, Squabble further separates its views from its users' by posting messages on the

Platform via its own corporate account. Like all accounts on the Platform, Squabble's account and its posts are clearly labeled with its username, "Squabble." (R at 7). Accordingly, HB 3420's limits on user censorship do not compel Squabble to communicate the speech of others because the Platform's disclaimer and labeled corporate account, make clear that user speech is distinct from the Platform's own expression. *See Turner*, 512 U.S. at 657 (reasoning that local broadcast channels' disclaimers that its TV shows do not represent the views of cable providers weighed for finding that channel must-carry regulations did not compel cable providers to speak).

II. HB 3420 is Content-Neutral and Serves a Legitimate Government Interest

Even if HB 3420 is found to regulate Squabble's speech, the statute is still lawful because it is content-neutral and easily satisfies intermediate scrutiny. While the First Amendment provides powerful protections over the right of free expression, the right is not limitless. *See e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973) (upholding ordinance that prohibited a newspaper from printing job opening advertisements that discriminated against applicants based on gender). Where a challenging party fails to establish that a regulation interferes with their speech, expression, and other constitutional rights, the regulation is constitutional so long as it rationally serves a legitimate government interest. *PruneYard*, 447 U.S. at 84-88 (applying lower level constitutional scrutiny to uphold a regulation that did not invade plaintiff's First Amendment rights). On the other hand, content-neutral regulations that impose "incidental" burdens on speech are lawful if the burden is "no greater than is essential," to promote "a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67 (internal citations omitted).

A. HB 3420 does not Interfere with Squabble's First Amendment Rights

Where a regulation does not interfere with a party's freedom of expression, rational basis review applies. In *PruneYard*, the Court applied lower level constitutional scrutiny to uphold a

regulation requiring a mall owner to host visitors' expression where the owner's First Amendment Rights of expression were not threatened and the law at issue furthered a legitimate government interest. *PruneYard*, 447 U.S. at 85. Like the mall in *PruneYard*, Squabble has not established that HB 3420 violates its freedom of expression by interfering with its ability to speak. Thus, as in *PruneYard*, heightened First Amendment scrutiny has not been triggered in this case. *Id.* at 88.

B. HB 3420 Applies Uniformly to Squabble's Content Moderation Practices Without Consideration for the Ideological Views or Content that Squabble Censors

Regulations are content-neutral when they "confer benefits or impose burdens on speech without reference to the ideas or views expressed." *Turner*, 512 U.S. at 643. And a content-neutral regulation is lawful if it promotes a "substantial governmental interest" and its incidental affect on "First Amendment freedoms is no greater than is essential." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). In *Turner*, a rule requiring cable providers to carry certain broadcast-channels was content-neutral because it regulated based on channels' locations and technical attributes rather than the TV programming shown or views expressed. 512 U.S. at 643-44 & 655.

HB 3420 is content-neutral because it applies equally to all user content regardless of the of the author's identity or the message conveyed. Further, the statute does not favor or burden any user or viewpoint but instead ensures all users have access to the modern town square regardless of their perspective. Accordingly, as HB 3420 serves the legitimate purpose of promoting public debate and discussion, the regulation is constitutional. *See id.* at 663 (holding that facilitating discussions involving varied political viewpoints, is a "government purpose of the highest order.").

As the Court noted in *Turner*, the First Amendment "does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical

pathway of communication, the free flow of information and ideas." *Id.* at 657. Rather than limit social media platforms' freedom of speech, HB 3420 protects the general public's First Amendment freedoms from the social media platforms. Thus, HB 3420 is in line with regulations the Court has upheld because it does not impede speech itself but instead prevents private parties from doing so. *See e.g.*, *id.* (upholding law requiring large cable-providers to carry local channels); *Associated Press v. Nat'l Lab. Rels. Bd.*, 301 U.S. 103, 132-33 (1937) (upholding order prohibiting newspaper from firing an employee for union organizing); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (upholding order enjoining newspaper conglomerate's anti-competitive behavior).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals and hold that Califflorida HB 3420 does not compel speech or interfere with Squabble's ability to communicate its desired message.

Respectfully Submitted,

/s/ *R22*
R22, Attorney for Respondent

Applicant Details

First Name	**Alexander**
Last Name	**Castro**
Citizenship Status	**U. S. Citizen**
Email Address	**castro8@wisc.edu**
Address	**Address** **Street** **5022 Sheboygan Avenue Apt 1** **City** **Madison** **State/Territory** **Wisconsin** **Zip** **53705**
Contact Phone Number	**931-260-0934**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Wisconsin Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=35002&yr=2009**
Date of JD/LLB	**May 11, 2024**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Wisconsin Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wright, Steven
shwright@wisc.edu
Didwania, Stephanie
stephanie.didwania@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Alexander Castro

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06/12/2023

Judge Juan Sanchez

United States District Court, Eastern District of Pennsylvania

Dear Judge Sanchez,

I am a third-year student at the University of Wisconsin Law School in approximately the top 15% of my class, and a Member, soon to be a Managing Editor, of the Wisconsin Law Review. I am writing to express my interest in your chambers for the 2024 term. As someone who is Hispanic and interested in practicing in Pennsylvania in the future, I would greatly enjoy the opportunity to work in your chambers. I believe that your chambers would be the perfect opportunity to develop my skills as a legal practitioner, learn more about trial procedure, and form connections with legal practitioners to potentially practice in Pennsylvania in the future.

Throughout my time in law school, I focused on developing the research and writing skills necessary to succeed as a litigator and as a judicial law clerk. As a clinical student in the Constitutional Litigation Appeals and Sentencing Project, I researched and wrote on a range of legal topics, including post-conviction motions, novel issues of statutory interpretation, ineffective assistance of post-conviction counsel, and drafted a motion for reconsideration. This past year, I served as a member of the Wisconsin Law Review where I sharpened my cite-checking abilities and attention to detail, engaged with scholarship across the legal spectrum, and authored my own Note on a recent Wisconsin Supreme Court case, *Teigen v. Wisconsin Elections Commission*. Finally, I have also excelled in courses directly relevant to the work done by a clerk, such as receiving an A in Civil Procedure I and Federal Jurisdiction and an A+ in Civil Procedure II. I have also challenged myself by taking difficult doctrinal courses such as Administrative Law, Federal Jurisdiction, and Conflict of Laws. I will continue to sharpen my research and writing skills this summer as a student extern in the Appeals Division of the Wisconsin Department of Justice.

I have enclosed the requested information in my application packet. If my application interests you, I look forward to hearing from you. Thank you for taking the time to review my application and consider me for this opportunity.

Alexander Castro

5022 Sheboygan Avenue, Apartment 1 ● Madison, WI 53705 ● (931) 260-0934 ● castro8@wisc.edu

Education

University of Wisconsin Law School — Madison, WI
Juris Doctor Candidate — May 2024

- **GPA**: 3.58/ Top 15%
- **Journal**: Member of Wisconsin Law Review (Upcoming Managing Editor 3L)
  - **Note Topic**: Teigen v. Wisconsin Elections Commission (Standing and Statutory Interpretation)
- **Activities:** First Generation Lawyers
- **Awards:** Boardman Clark Summer Public Interest Fellowship

University of Chicago — Chicago, IL
Bachelor of Arts in Political Science and East Asian Languages and Civilizations — May 2021

- **Honors:** University Scholar, National Hispanic Merit
- **Activities**: EU Chicago

Experience

Wisconsin Department of Justice- Criminal Appeals Section — Madison, WI
Summer Student Extern — June 2023- August 2023

Constitutional Litigation, Appeals, and Sentencing Project at the Frank J. Remington Center
Madison, WI
Summer Student Clinical Intern — June 2022- August 2022

- Observed court proceedings and learned how to efficiently synthesize client files
- Researched state statutes and federal case law
- Collaborated with peers to draft an appellate brief and a petition for reconsideration

University of Chicago Regenstein Library — Chicago, IL
Student Bookstacks Assistant — February 2018- May 2021

- Provided customer support for navigating the library and locating requested books
- Exhibited attention to detail by organizing books according to the Library of Congress system

Regional Office of Education #17 — Bloomington, IL
Metcalf Student Intern — June 2019- September 2019

- Developed a research database to assist with future proposals and projects of the ROE
- Created a non-traditional school grant proposal and an instructional handbook with staff

New Beginnings Myofascial Release Therapy LLC — Cookeville, TN
Administrative Assistant — May 2017- September 2017

- Created a mass emailing and marketing list for client
- Managed excel database for client contact information, scheduling visits, and payment history

Additional Information

Language: Basic Japanese
Interests: Tottenham Hotspur (Soccer), Hockey, Video and Board Games, History, and Fantasy

Course History Report for Alexander Castro

This document lists the courses, credits, and reported grades for the above-named student of the University of Wisconsin Law School during their current matriculation. This letter is not an official transcript and does not contain information concerning previous course work at the University of Wisconsin-Madison.

Fall 2021

Course #	Title	Instructor	Credits	Grade
714-002	Civil Procedure I	Meyn	4	A
723-002	Legal Research and Writing	Fox	3	B-
726-004	Intro-Substan Criminal Law	Didwania	4	A-
711-001	Contracts I	Hendley	4	B
Semester:	Credits: 15 GPA Credits: 15	GPA Points: 50.9	GPA: 3.39	
Overall:	Credits: 15 GPA Credits: 15	GPA Points: 50.9	GPA: 3.39	

Spring 2022

Course #	Title	Instructor	Credits	Grade
715-001	Torts I	Barkan	4	A
723-004	Legal Research and Writing	Wu	3	B+
724-001	Property	Klug	4	B
940-108	Legislation and Regulation	Desai	3	B+
Semester:	Credits: 14 GPA Credits: 14	GPA Points: 47.8	GPA: 3.41	
Overall:	Credits: 29 GPA Credits: 29	GPA Points: 98.7	GPA: 3.40	

Summer 2022

Course #	Title	Instructor	Credits	Grade
854-001-BJJ	Const Lit, App & Sent Project	Wright	6	S
950-001-BJJ	Federal App Lit & Practice	Wright	1	A
Semester:	Credits: 7 GPA Credits: 1	GPA Points: 4	GPA: 4.00	
Overall:	Credits: 36 GPA Credits: 30	GPA Points: 102.7	GPA: 3.42	

Fall 2022

Course #	Title	Instructor	Credits	Grade
850-001	Professnl Responsibilities	Raymond	3	B+
899-001	Law Review	Yackee	2	S
820-001	Conflict of Laws	Monette	3	S
802-001	Civil Procedure II	Wilde	3	A+
731-001	Constitutional Law I	Schwartz	3	B+
Semester:	Credits: 14 GPA Credits: 9	GPA Points: 32.7	GPA: 3.63	
Overall:	Credits: 50 GPA Credits: 39	GPA Points: 135.4	GPA: 3.47	

Spring 2023

Course #	Title	Instructor	Credits	Grade
725-003	Intro to Criminal Procedure	Tobin	3	A
740-001	Constitutional Law II	Braver	3	A
744-001	Administrative Law	Tai	3	A-
824-001	Federal Jurisdiction	Yablon	3	A
899-001	Law Review	Yackee	2	S

Semester:	Credits: 14	GPA Credits: 12	GPA Points: 47.1	GPA: 3.93
Overall:	Credits: 64	GPA Credits: 51	GPA Points: 182.5	GPA: 3.58

Fall 2023 - Future Courses

Course #	Title	Instructor	Credits	Grade
771-001	Trusts & Estates I	Erlanger	2	
801-001	Evidence	Findley	4	
918-003	International Human Rights	Atapattu	3	
940-008	Civ Disobed, Strikes & Riots	Braver	3	
940-012	Race, Racism and the Law	Mitchell	2	
950-008	Watergate	Tuerkheimer	1	

Semester:	Credits: 15	GPA Credits: 0	GPA Points: 0	GPA: n/a
Overall:	Credits: 79	GPA Credits: 51	GPA Points: 182.5	GPA: 3.58

Report Generated on 06/09/2023

Official transcripts available from the University of Wisconsin Office of the Registrar.

April 27, 2023

Re: Clerkship Recommendation for Alex Castro.

Your Honor,

I write to encourage you to offer Alex Castro a clerkship in your chambers. As a former federal appellate clerk, I'm confident that he possesses the talent and integrity necessary to contribute meaningfully to your chambers. He is bright, trustworthy, reliable, and responsible. Therefore, I give him my highest possible recommendation.

To be clear, I know Alex well. He and I litigated cases, side by side, during the summer of 2022. In short, Alex enrolled in my law-school clinic, the Constitutional Litigation Appellate and Sentencing Project. Our docket prepared him well to clerk in your chambers. Through our discretionary docket, we accept niche cases that explore issues of first impression, rarely litigated statutes, and archaic modes of relief. This docket requires students to interpret statutes, demonstrate syllogistic thinking, craft compelling narratives, evaluate competing authorities, and articulate complex concepts.

Alex contributed substantially to two cases. The first case, a federal appeal, litigated a Fourth-Amendment issue of first impression. The second case both asserted a state-based claim of innocence and litigated the issues related to the Sixth-Amendment jury right.

Let me be unequivocal. Alex is the strongest student to pass through this clinic. He, like many of your applicants, is exceptionally bright and hardworking. He researches well; he writes well. He's thoughtful, recognizing the nuance and complexity of law and fact often present in litigation. But more than most students I known, he's an incredibly pleasant person. His classmates adored him. He demonstrated an exceptional willingness to collaborate and to help struggling classmates. He did so discreetly, without seeking credit or acknowledgment, without demanding thanks or reward.

Based upon my experience, both as a professor and a former federal appellate clerk, I am confident that Alex will be an excellent attorney, a leader in the legal profession, and a stellar clerk. He is a gifted student with boundless potential. He is smart and creative, diligent in his studies, and thoughtful in his speech. Therefore, I enthusiastically and unreservedly recommend Alex for a clerkship in your chambers.

Please feel free to contact me directly if you have any further questions. My e-mail address is: shwright@wisc.edu. My direct telephone number is: 608-890-3540.

Thank you,

Steven Wright

Clinical Associate Professor
Director. Constitutional Litigation Appellate and Sentence Project.
http://law.wisc.edu/profiles/shwright@wisc.edu

Stephanie Holmes Didwania
Assistant Professor of Law (through May 21, 2023)
stephanie.didwania@gmail.com
cell: (630) 854-6319

May 29, 2023

Re: Judicial Clerkship Letter of Recommendation for Alexander Castro

Dear Judge Sánchez,

I am writing to emphatically recommend my student, Alexander Castro (who goes by "Alex"), who has applied for a judicial clerkship in your chambers. Alex is an exceptionally strong student, a careful thinker, and an extremely sincere person. I believe he will be a fantastic law clerk, and I can't recommend him highly enough. On a personal note, I started my career as a professor at Temple Law School, and I consider Alex to be comparably talented to my very best Temple students.

I have known Alex since the start of his 1L year at the University of Wisconsin Law School, where until recently I was an Assistant Professor of Law (I am joining the faculty at Northwestern Pritzker School of Law this summer). Alex was a student in my first-year course, Introduction to Substantive Criminal Law. In that class, Alex was one of my best students. Over the course of that semester, I got to know Alex because he frequently contributed to class discussions and came to my office hours to chat and seek advice. Based on those conversations and interactions, I found Alex to be inquisitive and thoughtful. Impressed by Alex's talent, I attempted to hire him to work as a discussion group leader for my fall 2022 criminal law class. Unfortunately, Alex's fall semester commitments prevented him from taking the job, to my great disappointment.

In having Alex as a student and getting to know him outside of class, I learned that he has many of the skills that will make him an excellent law clerk. For one thing, Alex is a very sharp thinker. When he speaks up in class, his comments and questions are among the most insightful. As a first-year law student, he already had the ability to identify doctrinal nuance—an important legal skill that many law students hone and develop over the course of law school and that we rarely observe in students in the first semester of law school. I was therefore not surprised to learn that Alex has earned excellent grades across a wide range of doctrinal courses during his time in law school.

Alex is also extremely hard-working. His 2L course schedule is among the most—if not *the most*—demanding I have ever seen in a law student. In the second year of law school alone he has taken: Constitutional Law I and II, Civil Procedure II, Administrative Law, Criminal Procedure, and Federal Jurisdiction. These are among the most challenging classes offered by the law school, and Alex has performed at an exceptionally high level in them. These courses are also precisely the courses that will

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serve Alex well as a judicial law clerk. I thus believe he could balance the variety of responsibilities and work required of a law clerk.

I also read with great interest Alex's Wisconsin Law Review Note, *Teigen v. Wisconsin Elections Commission: Generalized Voter Standing, the Myth of Voter Fraud, and the Future of Wisconsin Democracy*, after he asked me to write this letter. In the Note, Alex masterfully critiques the *Teigen* case, in which the Wisconsin Supreme Court held that the Wisconsin Elections Commission's use of absentee ballot drop boxes was not permitted under Wisconsin law. Alex persuasively argues that one problem with the majority's analysis was that it created standing for the Wisconsin-voter plaintiffs. Alex cleverly points out, however, that generalized voter standing might in future disputes work to benefit those who wish to expand voter access. The Note as a whole demonstrates that Alex is not only capable of meticulously analyzing legal issues, but also of thinking about the law broadly and critically: clearly imagining how it should be changed or improved.

Over the last two years, I have also gotten to know Alex outside of class. Through these conversations, I learned that Alex participates in a wide variety of activities and organizations at the Law School, including the *Wisconsin Law Review*, for which he will be a Managing Editor during his third year of law school. I therefore have no doubt that Alex will rise to the intellectual challenge of working as a law clerk on a variety of cases.

Alex, in sum, is both an outstanding student and a thoughtful person. I think he has incredibly good instincts about the law. believe he will be a superb law clerk and, ultimately, a fantastic attorney. For these reasons, I highly recommend Alex for a judicial clerkship. If you would like to discuss his abilities and accomplishments further, please do not hesitate to call me at (630) 854-6319 or email me at stephanie.didwania@gmail.com.

Sincerely,

Stephanie Holmes Didwania

Stephanie Holmes Didwania

Alexander Castro
Writing Sample: Cover Letter

The provided writing sample contains excerpts from my Wisconsin Law Review Note, "*Teigen v. Wisconsin Elections Commission: Generalized Voter Standing, the Myth of Voter Fraud, and the Future of Wisconsin Democracy*." *Teigen* is a recent Wisconsin Supreme Court case that considers the legality of ballot drop boxes. Due to size constraints for the writing sample, I have elected to focus on one part of analysis in the Note: my analysis of standing, in particular the injury in fact requirement. I have included the full abstract for the Note below.

ABSTRACT

No issue has quite dominated the American consciousness like the future of democracy in recent years. Voters on both sides of the aisle have raised concerns: whether with democratic backsliding, restrictions on ballot access, claims of a "stolen" election, and of course voter fraud. In particular, formerly uncontroversial absentee voting methods, such as ballot drop boxes, have come under scrutiny by conservative litigants who argue that absentee voting is uniquely vulnerable to the "existential" threat of voter fraud. However, these claims are based on the irrational myth of widespread voter fraud, and many national courts have recognized such arguments as unmeritorious and dismissed them without humoring these claims.

Unlike these national courts, the Wisconsin Supreme Court in Teigen v. Wisconsin Elections Commission *decisively legitimized such dangerous claims. In a remarkably flawed opinion, the Teigen court held that the ballot drop boxes established by the WEC were unauthorized and invalid. While this holding was already catastrophic enough for its ramifications on ballot access, the court's reasoning is even more devasting for Wisconsin's democracy. By creating generalized voter standing based on irrational claims about the threat of voter fraud and outright rejecting the statutory interpretation method established by* Kalal *by ignoring the plain language of the statute and the context of surrounding statutes, the* Teigen *court fundamentally damaged Wisconsin's democracy by perpetuating the myth of voter fraud, which challenged the integrity of Wisconsin's electoral system and consequently undermined the state's democratic legitimacy. This Note argues that the legislative policy against absentee voting and the court's own skepticism motivated this woefully misguided decision. However, this Note also argues that the decision, particularly the creation of generalized voter standing, also offers hope for future democratic advocates by granting them greater access to the courts. However, this pro-democracy perspective only offers solace so long as Wisconsin courts reject dangerous election litigation based on claims about voter fraud in favor of pro-democratic election litigation intending to remedy democratic health in one of the most undemocratic states in the country.*

INTRODUCTION

The absentee voting issue in *Teigen* was the legality of ballot drop boxes under the Wisconsin statutes. In *Teigen*, the Wisconsin Supreme Court held that the WEC's authorization of ballot drop boxes was unlawful. The Supreme Court of Wisconsin erred because it embraced skepticism of absentee voting, as expressed in the legislative policy against absentee voting, to

such an extent that it ignored critical flaws in its standing analysis. In particular, the court created overly broad voter standing due to its irrational belief in the myth of voter fraud and consequent skepticism of absentee voting.

Part I of this Note argues that the *Teigen* court erred in interpreting Wisconsin's standing, statutory interpretation, and other relevant election-related doctrines. Part II of this Note argues that the court's errors were driven by the skepticism of absentee voting and the myth of voter fraud. Part III concludes that until the Wisconsin legislature reconsiders the legislative policy against absentee voting, Wisconsin courts should reinterpret *Teigen* through a pro-democracy lens to reinforce Wisconsin's democracy by rejecting theories of voter fraud and instead basing future standing decisions to election litigation on pro-democratic and pro-ballot access grounds.

A. STANDING TO CHALLENGE AGENCY ACTION IN WISCONSIN

Unlike in federal courts where jurisdiction is limited to only "cases" or "controversies",[1] standing in Wisconsin is a matter of "sound judicial policy."[2] However, despite this difference, Wisconsin has largely embraced federal standing requirements as persuasive.[3] In Wisconsin, "standing is construed liberally" and "even an injury to a trifling interest may suffice."[4] For all types of standing analysis, Wisconsin courts consider various policy factors.[5] For standing to challenge agency action, in particular, Wisconsin courts conduct a two-step test, asking whether the agency action directly caused injury to the plaintiff and whether the interest is legally recognized by law.[6]

Wisconsin has adopted a two-step analysis to determine standing to challenge agency action. In *Friends of the Black River Forest v. Kohler Co.*, the Wisconsin Supreme Court held that the plaintiff lacked standing by applying a two-step test.[7] In applying the test, the court noted that standing, in this context, is governed by Wis. Stat. §§ 227.52 and 227.53. The first step asks "whether the decision of the agency directly causes injury to the interest of the petitioner."[8] The court stated that such an injury can be remote in time, but the injury "must be neither hypothetical nor conjectural."[9] The court "assumed without deciding" that the petitioner's alleged injuries satisfied the first step.[10] In describing the second step "whether the interest

[1] *See* U.S. Const. art. III, § 2, cl. 1.

[2] *McConkey v. Van Hollen*, 783 N.W.2d 855 (Wis. 2010).

[3] *See Friends of the Black River Forest v. Kohler Co.*, 977 N.W.2d 342, 350-51 (Wis. 2022).

[4] *McConkey*, 783 N.W.2d at 860.

[5] *See Teigen*, 976 N.W.2d at 528-29.

[6] *See Id.*

[7] *Friends of the Black River Forest*, 977 N.W.2d at 345.

[8] *Id. at* 351-52.

[9] *Id.*

[10] *Id. at* 356-57.

asserted is recognized by law," the court rejected the federal zone of interests test as it went against the text of Wis. Stat. ch. 227.[11] The court argued that the second step should be decided by a "textually-driven analysis" rather than by "judicial notions of what should be or what may constitute good policy."[12] The second step requires a plaintiff to identify a statute protecting or regulating the interests allegedly injured.[13] While the plaintiff cited several statutes to support their argument, the court held that none protected or regulated their asserted interests.[14] In particular, the court rejected a legislative policy argument because a statement of purpose does not establish the requisite substantive criteria to challenge an agency action. [15]

While Wisconsin courts usually grant standing, they will not grant standing for an injury that is so "conjectural or hypothetical…as to strain the imagination."[16] In *Fox v. Wisconsin Department of Health and Social Services*, the plaintiff claimed injuries resulting from the failure of an agency to "rigorously explore the alternative of placing a prison in Milwaukee county."[17] In particular, the plaintiff argued that placing the prison in an alternative location would increase the rate of recidivism because further distance from Milwaukee County would make visitation more difficult, and increased recidivism rates would harm him in his official capacity as District Attorney.[18] In addition, the plaintiff argued that placing prisoners far from their homes would result in disintegrating their families and increase welfare costs. [19] The court rejected these proposed injuries as too hypothetical because they only arose from presumed psychological effects on inmates, and the plaintiff only claimed he was injured due to policy costs caused by those effects. [20] Based on this analysis, court held that it would not grant standing because the claimed injuries "will result only if a sequence of increasingly unlikely events actually occur."[21]

While standing may be "construed liberally", Wisconsin courts do not always grant standing. Standing serves a useful gatekeeping role, and Wisconsin courts recognized the doctrine as performing an important function. Besides standing, the other major issue considered by the court was how to interpret the statutory language at issue

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[11] *Id. at* 352-54.

[12] *Id. at* 355.

[13] *Id. at* 356.

[14] *Id*.

[15] *Id*.

[16] *Fox v. Wisconsin Dep't of Health & Social Services*, 334 N.W.2d 532, 539 (Wis. 1983).

[17] *Fox,* 334 N.W.2d at 538.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id.* at 539.

I. TEIGEN V. WISCONSIN ELECTION COMMISSION ANALYSIS

This Part argues that the *Teigen* court erred in its standing analysis by court's standing creating a dangerous precedent for future election litigation based on spurious claims about voter fraud. The court should have pursued alternative approaches to its standing analysis. Instead, the court embraced the myth of voter fraud and skepticism towards absentee voting and greatly threatened the future of Wisconsin's democracy. While *Teigen* poses severe potential consequences to Wisconsin, pro-democracy advocates should also engage with the widening of standing doctrine to protect and expand democracy rather than letting only anti-democratic theories about voter fraud dominate election litigation.

A. STANDING

In conducting the standing analysis in *Teigen*, the Wisconsin Supreme Court erred in two major ways. First, the court erred by asserting that the plaintiff's alleged injury, the failure to follow election law, satisfied the injury prong of the standing test because it was "hypothetical" and not actually an injury. In particular, the injury was hypothetical because it relied on the unproven and dangerous myth of voter fraud. Second, the court erred because granting standing harmed Wisconsin's policy, in particular undermining standing to such an extent as to render the doctrine meaningless in election law cases.

1. HYPOTHETICAL INJURY

The Wisconsin Supreme Court erred when it decided that the plaintiff suffered an injury to their right to vote. To satisfy the injury prong of the standing analysis, the plaintiff must allege "injuries that are a direct result of the agency action."[22] While this prong "presents a low bar" and can be remote in time, the injury must be "neither hypothetical nor conjectural."[23] Here, the alleged injury to the plaintiff's right to vote was hypothetical. Because the injury was hypothetical, Teigen could not have alleged that they suffered an injury and should not have been granted standing.

This injury was hypothetical because voter confidence in the outcome of the election should not have been harmed through the use of ballot drop boxes. The majority's argument assumed that voter confidence in the electoral system was injured whenever the electoral laws were not followed exactly as written "the failure to follow election laws…forces everyone…to question the legitimacy of election results."[24] In particular, the court described the failure to follow election laws as a type of "pollution" "[u]nlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results."[25] Under this theory, even the slightest deviation would be sufficient to grant standing. However, the Wisconsin Supreme Court had previously rejected such a theory, finding for example that the addition of a

[22] *Id.* at 529.

[23] *Friends of the Black River Forest*, 977 N.W.2d at 352.

[24] *Teigen*, 976 N.W.2d at 530.

[25] *Id.*

state's name or the zip code by municipal clerks to "several thousand absentee ballots" was not sufficient to strike the ballots even when the election statutes did not explicitly authorize such additions.[26] Of course, Teigen alleged that thousands of illegally cast ballots, not just one, caused their injury.[27]

However, neither this argument nor the pollution theory persuasively addressed why the injury was not hypothetical. According to the court, increasing the number of ballots illegally cast would only harm voters as the pollution caused by unlawful votes would "obscure[] their vote", effectively making them "a man without a vote."[28] However, the court could have also determined that there was an equal likelihood that these illegally cast votes could have benefited the outcomes that voters wanted.[29] Nevertheless, the court rejected the equal likelihood argument, arguing that the theory was "pure speculation" while the perception of such an impact by voters was the real injury.[30] However, the majority's "pollution" theory was just a matter of pure speculation as the court presented no evidence to support its theory, which required incredible evidence to prove due to the lack of evidence for voter fraud .[31]

The court attempted to address the lack of evidence by asserting that the failure to follow election laws would lead to tyranny.[32] However, the court provided no evidence to support this theory. The court's only argument was that the right to vote lost any meaning under a tyrant who violated election law to win and restricted voter choice to just themselves.[33] Under this reasoning, the court argued that the right to vote lost any meaning when elections were not conducted according to the law.[34] However, such an argument was flawed. Ballot drop boxes have been employed by other states and other democracies to improve ballot access without subsequent descent into dictatorship.[35] Furthermore, even if the failure to follow election laws specifically

[26] See *Trump v. Biden*, 951 N.W.2d at 581 (Hagedorn, J., concurring).

[27] *See Teigen*, 976 N.W.2d at 530.

[28] "When the level of pollution is high enough, the fog creates obscurity, and the institution of voting loses its credibility as a method of ensuring the people's continued consent to be governed….A man with an obscured vote may as well be "a man without a vote." *Id. at* 530-531.

[29] The DSCC argued for such, stating "it is equally unlikely that such [unlawful] may vote for the same candidates who[m] [the Wisconsin voters] support, which would seem to benefit, not harm them." *Id.* at 530.

[30] *See Id.* at 530-31.

[31] For evidence for its sweeping assertions, the court cited opinions that similarly lacked any evidence beyond vague fears. *See Id. at 530-31* ("There is nothing in the record before us to indicate that any of [the absentee ballots] were actually tampered with by any unauthorized person, but it is entirely obvious that the opportunity to do so was present.") (citing Clark v. Quick, 377 Ill. 424, 36 N.E.2d 563, 566 (Ill. 1941)

[32] "If the right to vote is to have any meaning at all, elections must be conducted according to law. Throughout history, tyrants have claimed electoral victory via elections conducted in violation of governing law…. Even if citizens of such nations are allowed to check a box on a ballot, they possess only a hollow right." *Teigen,* 976 N.W.2d at 530-31.

[33] *Id.*

[34] *Id.*

[35] Sherman, *supra* note 9.

was the issue, this argument would likewise be flawed because Wisconsin has previously used "illegal" ballot drop boxes without the state falling into tyranny.[36] Finally, by making this unsubstantiated argument, the court encouraged fear-mongering about Wisconsin's democracy during a time of great uncertainty.[37]

The injury was hypothetical because there was no causal relationship between the use of ballot drop boxes and weakening voter faith in the electoral system. Voter faith in the electoral system was weakened when they believed that electoral outcomes did not reflect their vote.[38] According to the court, voters felt this way when elections were conducted "outside of the law."[39] However, voter confidence was not causally related to how strictly the state followed election law or the fairness of such laws. If following election law was the only concern that motivated voter confidence, then most voters would view elections as fair because most voters, approximately 84% of registered voters, viewed state election rules as fair, and 70% of registered voters believed elections would be administered very or somewhat well during the 2022 election.[40] However, registered voters, particularly Republican voters, were strongly predisposed against absentee votes, as while 79% of Republican registered voters, and 84% of all voters, were confident that votes cast in person would be counted accurately, only about 37% of Republican voters, and 62% of all voters, felt the same about absentee and mail ballots.[41]

Based on this data, skepticism towards absentee ballots, particularly Republican skepticism, drove the lack of voter confidence in election outcomes rather than how strictly election law was followed. These voters were concerned about absentee voting because they were concerned about voter fraud and believed that ballot drop boxes would make voter fraud occur more easily.[42] These voters were not worried about ballot drop boxes being potentially unlawful until absentee voting became associated with voter fraud.[43] Even voter fears about voter fraud were not enough to allege an injury because there was no evidence of voter fraud, making it nothing more than a hypothetical injury.[44] Since the injury of implementing illegal ballot drop boxes was largely caused by its connection to the hypothetical injury of voter fraud, the alleged injury must have also been hypothetical and not an injury.

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[36] *See* Patrick Marley, *Ballot drop boxes not allowed in Wisconsin, state Supreme Court rules*, MSN (July 8, 2022) https://www.msn.com/en-us/news/politics/ballot-drop-boxes-not-allowed-in-wisconsin-state-supreme-court-rules/ar-AAZmrU8.

[37] *See Teigen*, 976 N.W.2d at 578 (Wis. 2022) (Bradley, J., dissenting).

[38] *See Id.* at 530 (majority opinion).

[39] *See Id.*

[40] Pew Research Center, Two Years After Election Turmoil, *GOP Voters Remain Skeptical on Elections, Vote Counts*, PEW RESEARCH CENTER (Oct. 31, 2022) https://www.pewresearch.org/politics/2022/10/31/two-years-after-election-turmoil-gop-voters-remain-skeptical-on-elections-vote-counts/.

[41] *Id.*

[42] According to the plaintiff, "a drop box contains only ballots, and lots of them in one place at the same time, making it a prime target for would-be tamperers." *See Teigen*, 976 N.W.2d at 543.

[43] "For years, ballot drop boxes were used without controversy in Wisconsin." Marley, *supra* note 161.

[44] *See* Eggers, Garro, & Grimmer, *supra* note *6*.

Finally, Wisconsin courts have previously recognized similar injuries as too hypothetical to grant standing, particularly when they "will result only if a sequence of increasingly unlikely events actually occur."[45] Like the court in *Fox* which declined to grant, the *Teigen* court should have declined to grant standing because the claimed injury, the erosion of voter confidence, required an equally unlikely series of events to result from establishing ballot drop boxes. Like placing a prison in an alternative location in *Fox*, the agency action in *Teigen* was originally a policy decision made to benefit the public by increasing ballot access. Like increased recidivism rates and welfare costs were only tenuously connected to the alternative location by the theoretical psychological damage caused to prisoners and prisoner families in *Fox*, the claimed injury in Teigen, decreased voter confidence, was even more tenuously connected to establishing ballot drop boxes because decreased voter confidence required believing an increasingly irrational series of ideas for an impact to occur. In particular, it required: belief in the threat of voter fraud, that not following absentee election laws strictly would cause voter fraud, and finally voter fraud would occur to such an extent that it would change election results.

Since these beliefs are irrational and evidence is severely lacking to support any of these claims, the claimed injury is even more hypothetical than the injury in *Fox*, as the proposed impact of increased recidivism from reducing visiting hours is a much more rational theory compared to the irrational beliefs required to believe that ballot drop boxes were dangerous to the integrity of elections. Unlike the court in *Fox* which explicitly rejected the plaintiff's alleged injuries in their capacity as district attorney, which resulted from the psychological impact on prisoners, the court in Teigen created generalized voter standing for any voter claiming damage resulting from the psychological impact of decreased confidence for other voters. Based on the above reasons, the *Teigen* court should have denied standing.

The alleged injury in fact was hypothetical and failed to satisfy the first prong of standing. Even if Wisconsin voters' confidence in the electoral system was polluted by thousands of votes cast by unauthorized ballot drop boxes, voters were not injured by the failure to follow election law and fears of tyranny as the court claimed. Instead, the plaintiffs were harmed based on their belief that non-strictly regulated absentee voting enabled voter fraud to occur. However, because the connection between ballot drop boxes and voter fraud was irrational due to lack of evidence of voter fraud, this alleged injury was hypothetical and not sufficient. To conclude, the court should have denied standing for failure to prove an injury.

II. CONCLUSION: WISCONSIN DEMOCRACY AFTER TEIGEN

After *Teigen*, standing has become effectively meaningless as a procedural gatekeeping mechanism for election cases in Wisconsin. Future Wisconsin courts and proponents of democracy should be concerned that *Teigen* has exposed Wisconsin's democracy to increased legitimacy damaging attacks on the electoral system through increased litigation premised on judicial acceptance of the myth of voter fraud. They should also be concerned that such litigation will only further burden an already strained judicial system. However, *Teigen* does offer some hope for those of us who share the dissent's concern for the state of Wisconsin's democracy and do not believe that absentee voting and voter fraud are the biggest threats facing Wisconsin's democracy. By interpreting *Teigen*'s changes to standing from a democratic health perspective, pro-democracy activists and judges can reinterpret the judicial system's commitment to

[45] *Fox*, 334 N.W.2d at 539.

Wisconsin's democracy and reinvigorate the right to vote in one of the country's most gerrymandered states.

The Wisconsin Supreme Court erred in *Teigen* because it granted standing on a basis which legitimized irrational fears about voter fraud and severely reduced standing's utility as a gatekeeping mechanism thus harming Wisconsin's judicial efficiency. The court erred because it believed in the myth of voter fraud and was skeptical of absentee voting. This skepticism was largely driven by the legislative policy against absentee voting contained within Wis. Stat. § 6.84(1). Finally, since the legislature seems reluctant to explore changes to the legislative policy, a future court should reinterpret *Teigen* through a pro-democracy lens and utilize the new generalized voter standing to increase voter access to the judicial system and improve Wisconsin's democracy while rejecting irrational acceptance of the myth of voter fraud and skepticism towards absentee voting. To conclude, regardless of whether the current court would favor such an interpretation, legal advocates and pro-democracy activists should continue to advocate for such in order to remedy Wisconsin's current undemocratic state.

Applicant Details

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Date of JD/LLB	**May 21, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Environmental Law Journal** **Virginia Law Review**
Moot Court Experience	**No**

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Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 24, 2023

The Honorable Juan R. Sánchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sánchez:

I am a recent graduate of the University of Virginia School of Law interested in obtaining a clerkship in your chambers for the 2024-25 term. I intend to take the District of Columbia bar this summer and will begin my legal career in Washington at Morrison Foerster. Though I am beginning my career at a firm, I plan to make the transition to public service within the next five years.

As a trans, nonbinary lawyer, I am interested in clerking as a means to increase the presence and impact of LGBTQ+ lawyers in federal court. My interest in clerking on your court stems from my experience with trial practice during my 1L summer internship at the DOJ. I loved the fast-paced environment and strategic considerations involved from the other side of the bench and think I would similarly enjoy the clerking experience—both watching court in action and being a part of the decisionmaking enterprise.

I am enclosing my resume, my law school, graduate, and undergraduate transcripts, and a writing sample. You will also be receiving letters of recommendation from Vice Dean Michael D. Gilbert, Professor Charles Barzun, and Joseph R. Palmore.

Please reach out to me at the phone number or email above if I can offer further information. Thank you for considering my application.

Sincerely,

Holl M. Chaisson

Holl M. Chaisson

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EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., May 2023

- *Virginia Law Review*, Executive Editor; Membership Selection Committee
- *Virginia Environmental Law Journal*, Editorial Board
- Raven Society, Member
- Lambda Law Alliance, Career Development and Alumni Relations Chair
- Pro Bono Challenge Recipient (awarded to students who log 75+ hours of pro bono work prior to graduation)

Yale Divinity School, New Haven, CT
M.A.R., Religion & Ethics, May 2018

- Mary Cady Tew Prize (awarded to four students for exceptional ability in philosophy, literature, ethics, or history during the first year of study)

Houghton College, Houghton, NY
B.A., Philosophy (Minor: Religion), *summa cum laude*, May 2016

EXPERIENCE

Morrison & Foerster LLP, Washington, DC
Associate, Expected November 2023

Morrison & Foerster LLP, Washington, DC
Summer Associate, May 2022 - July 2022

- Assisted in drafting amicus brief on behalf of local governments as amici curiae in *Merrill v. Milligan* (S. Ct. Nos. 21-1086, 21-1087)
- Researched and drafted memo discussing the enforcement of recent ITAR cases for client use
- Conducted interviews of Afghan refugees for the purpose of drafting an amicus brief addressing harms resulting from SIV processing delays

United States Department of Justice, Criminal Division, Fraud Section, Washington, DC
Legal Intern, June 2021 - July 2021

- Drafted response brief opposing a motion for new trial in a health care fraud case
- Researched applicability of law of the case doctrine for a response to a motion to dismiss

Morrison & Foerster LLP, Washington, DC
Paralegal, Appellate and Supreme Court Practice, June 2018 - August 2020

- Reviewed, cite checked, and filed over 100 briefs and other papers in the United States Supreme Court, all thirteen Circuit Courts, and several state appellate courts
- Conducted factual and legal research for practice group business development, including tracking opinion data to highlight trends for practitioners in the Ninth and Federal Circuits

PUBLICATION

Note, *The Impermissibility of Sex as a Voter Qualification*, 109 VA. L. REV. (forthcoming June 2024)

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Date Printed **06/09/2023**

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National Id: *****4349
Birthdate: 03/03/XX

Degrees Conferred

Confer Date: 05/21/2023
Degree: Juris Doctor
Major: Law

Beginning of Law Record

2020 Fall

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6000	Civil Procedure	A-	4.0
LAW	6002	Contracts	A-	4.0
LAW	6003	Criminal Law	B+	3.0
LAW	6004	Legal Research and Writing I	S	1.0
LAW	6007	Torts	B+	4.0

2021 Spring

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6001	Constitutional Law	A-	4.0
LAW	6005	Lgl Research & Writing II (YR)	S	2.0
LAW	6006	Property	B+	4.0
LAW	6112	Environmental Law	A	3.0
LAW	7023	Emply Law: Contrcts/Torts/Stat	A-	3.0

2021 Fall

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6105	Federal Courts	B+	4.0
LAW	7189	Internet Law	B+	2.0
LAW	7740	Advis Brd Debt Restruct (SC)	B+	1.0
LAW	8004	Con Law II: Speech and Press	B+	3.0
LAW	8025	Advanced Contracts	A-	3.0

2022 Spring

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6113	Intro to Law and Business	B	2.0
LAW	7009	Criminal Procedure Survey	B+	4.0
LAW	7090	Regulatn of Political Process	B+	3.0
LAW	9248	Therptc Jus Evol Role Spec Crt	B+	3.0
LAW	9357	Identity, Law, & Politics Sem	A-	3.0

2022 Fall

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	6104	Evidence	B+	4.0
LAW	7071	Professional Responsibility	B+	3.0
LAW	8602	Appellate Litigatn Clinic (YR)	CR	4.0
LAW	8811	Independent Research	A	1.0
LAW	9089	Seminar in Ethical Values (YR)	YR	0.0

2023 January

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	7501	Spec Topics Short Course (SC)	A-	1.0

Course Topic: Social Id, Critcl Theory & Law

2023 Spring

School: School of Law
Major: Law

COURSE NUMBER		COURSE TITLE	GRADE	CREDITS
LAW	7062	Legislation	B+	4.0
LAW	8603	Appellate Litigatn Clinic (YR)	H	4.0
LAW	8810	Directed Research	CR	1.0
LAW	9090	Seminar in Ethical Values (YR)	CR	1.0
LAW	9341	Law of Corruption	A	3.0

Honor: Raven Society

End of Law School Record

Lorna Hawthorne
UNIVERSITY REGISTRAR

A PRINTED COPY OF AN ELECTRONIC TRANSCRIPT IS NOT OFFICIAL

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend with immense enthusiasm Holl Chaisson for a clerkship in your chambers. Holl is a first-generation law student and a very smart, determined, and professional person. Holl compares very favorably to other students of mine who have clerked for federal and state judges and has my strong recommendation.
I got to know Holl in the Spring of 2022 when they (Holl's pronouns are "they/them") enrolled in my course titled Regulation of the Political Process. The class covers everything from the Voting Rights Act to campaign finance, and it emphasizes the First and 14th Amendment doctrine. I had 72 students, including the Editor-in-Chief of the Virginia Law Review and several other local luminaries. Holl was outstanding in the group. Their engagement and sharp insights were clear to me and everyone else.
This semester Holl is taking a seminar from me titled The Law of Corruption. The course covers a variety of topics including bribery, campaign finance, presidential pardons, and the Emoluments Clause. We're approaching the halfway point of the semester, and I can say without hesitation that Holl is the strongest student in the room. They participate actively in every class session and consistently demonstrate a depth of thought that outpaces the competition.

Holl is writing a student note under my supervision. The note was inspired by a handful of news reports on trans persons being denied access to the ballot because the gender marker on their driver's license does not match the information in their voter registration. In pursuing this topic, Holl has uncovered a fascinating panoply of stories, cases, and statutes on the role of gender in voter verification. Some states do not direct poll workers to match voters' gender, yet poll workers occasionally do (or attempt to), and other states do direct poll workers to match gender, creating a variety of challenges not only for trans persons but for many others whose physical appearance does not match the gender data on file. I am confident that the note will be published and rightfully garner attention.

Separate from academics, Holl has been a model of engagement at UVA Law, serving as an editor on two journals, assuming leadership roles in Lambda (an organization for LGBTQ+ students), and nurturing our small but impactful trans community. Much of this is apparent from Holl's resume. What the resume does not show is Holl's personal side. They are unfailingly friendly and professional. They are kind, always composed, and always thoughtful. I believe Holl would make an excellent addition to your chambers.

Sincerely,

Michael Gilbert

Michael Gilbert - mgilbert@law.virginia.edu - 434-243-8551

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend highly Holl Chaisson for a clerkship in your chambers. Holl is an incredibly curious and thoughtful person, who I think would make a terrific clerk in your chambers.

I got to know Holl the fall of their second year when they enrolled in my Evidence class. I teach Evidence in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion. Holl's class had only 46 students in it, which was much smaller than my typical Evidence class because it was in the fall and so had no first-year students. That fact meant that I got to know the students better than I normally do. Holl impressed me throughout the semester because in class they frequently asked questions. And when they did so, they seemed genuinely engaged in the material in a way that is relatively rare—especially for a class of only 2Ls and 3Ls. The questions Holl asked invariably expressed a mix of skepticism and curiosity that seemed to me exactly the right one for a class on the Federal Rules of Evidence. On the final exam, Holl did well, earning a B+ in the course.

Holl also shined in a January-term class they took with me this past January, but how it came about that Holl was even in the class itself says much about their character. In preparing for the Evidence exam in December, Holl once attended my office hours with several other students. That night they emailed me, letting me know very politely that I had "misgendered" them, by referring to them as "her" (at the time they went by "Holly"). I immediately responded and apologized, explaining that I had had no idea they identified as non-binary (still a relatively new concept to me). But they wrote back saying very nicely that I should not feel bad and told me a little bit more about their background and time in law school. We then continued the email exchange, in which we discussed various matters, including Holl's time in Divinity School, their future plans, and many other things. We then decided to set up a lunch in January to chat more.

It was at that lunch that I told them about the J-term class I was teaching the following week entitled, "Social Identity, Critical Theory, and the Law," along with a philosopher from Dartmouth named David Plunkett. They enrolled in the course that day and ended up being the star of the group. The topics we covered in the class – race, gender, class, ideology, critique – were ones of intense intellectual and personal interest to Holl, so perhaps it was no surprised that each day of the class, they were among the most articulate and thoughtful students in the class. Nor were they ever defensive or combative when skeptical suggestions were raised about various aspects of what is labeled "identity politics." We have not yet assigned final grades for that class, but Holl's final paper, in which they compared the concept of "transgenderism" to "transracialism" showed considerable thought and sophistication.

Holl's performance in my classes has been about typical of their law-school performance overall. After five semesters, they have a GPA of 3.46, which places Holl right in the middle of their class. Holl has also been deeply engaged with the intellectual and extracurricular life of the law school. They serve on the editorial board of the Virginia Environmental Law Journal and worked as an Executive Editor of the Virginia Law Review. They also served as Career Development and Alumni Relations Chair of Lambda Alliance.

None of these facts, however, quite do justice to Holl or explain what makes them stand out. Holl is one of the most interesting and impressive students I've ever had the privilege of teaching. Consider this: Holl is a first-generation law student who comes from a working-class background (father is a plumber), who first went to a very small, very Christian college and then to Yale Divinity School, and who identifies as trans / non-binary. That is someone with a unique perspective, one quite different from that of the typical UVA law student. I think that has been tough for Holl, but everything I've seen of Holl makes me think that such experiences have only made them more independent, confident, and capable.

For all these reasons, I think Holl will make a great judicial clerk. Still, if you have any questions about them, or would like to discuss their candidacy any further, please do not hesitate to email me (cbarzun@virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

MORRISON FOERSTER

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SAN FRANCISCO, SHANGHAI, SINGAPORE,
TOKYO, WASHINGTON, D.C.

April 19, 2023

Writer's Direct Contact
+1 (202) 887-6940
JPalmore@mofo.com

Dear Judge:

I'm writing to enthusiastically recommend Holl Chaisson for a clerkship in your chambers. Holl is the complete package: smarts, unflappability, good humor, and collegiality.

I worked very closely with Holl for two years when they served as the paralegal in Morrison Foerster's Appellate and Supreme Court group, which I co-chair. This is a demanding position with a steep learning curve. Our paralegal must quickly master the Federal Rules of Appellate Procedure, Supreme Court rules, and local court rules. They must learn how to navigate ECF and other electronic filings systems. They must learn how to cite-check briefs—checking every single cited reference for accuracy—and absorb how critical that unglamorous task is to ensure the integrity of all our filings.

Holl came to us without any background in the law; they had just graduated with a master's in religion and ethics from the Yale Divinity School. They were thrown right into the demanding paralegal role with just a bit of overlap with their predecessor. They thus had to almost immediately get up to speed and provide critical support to a busy appellate practice. And they succeeded beyond all our expectations. I've worked with many paralegals during my career, and I don't hesitate in saying that Holl is at the top of the list. They were diligent and dogged; they knew when to ask for guidance and when to figure things out on their own; and they never lost their cool or their smile.

We've watched Holl's successes at UVA Law with pride—executive board of the *Virginia Law Review*, major role with the Lambda Law Alliance, two Fourth Circuit arguments through the appellate clinic, and summer job at DOJ. And we thought so highly of Holl that we recruited them back to the firm as a summer associate (and will welcome them as a full-time litigation associate later this year). During Holl's summer, I had the pleasure of working with them on a Supreme Court amicus brief and was thrilled with their insightful contributions to the project.

I know you will be flooded with incredibly qualified clerkship applicants, but I hope you give Holl's materials a close look. I would be happy to speak to you about Holl and answer any questions you might have.

MORRISON FOERSTER

April 19, 2023
Page Two

Sincerely,

Joseph R. Palmore
Managing Partner, DC

WRITING SAMPLE

The following is an excerpt from the opening brief in *Elijah v. Dunbar*, --- F.4th ---, No. 21-7352, 2023 WL 3028346 (4th Cir. Apr. 21, 2023) that I drafted as part of my work with the Appellate Litigation Clinic at UVA. This excerpt was filed and my writing was reviewed by my clinic director, Scott Ballenger. I presented rebuttal oral argument in this case on March 9, 2023. The Fourth Circuit agreed with my argument on this issue, holding that our client's objections to the magistrate judge's report and recommendation were sufficiently specific to warrant de novo review by the district court, and vacating and remanding the case for further proceedings.

Act of 2010. Elijah did not present that argument on direct appeal but, giving his § 2255 motion the generous reading appropriate for a *pro se* filing, he argued ineffective assistance of counsel in connection with his appeal. To avoid a miscarriage of justice, this Court should consider granting the certificate of appealability it denied last year—recalling the mandate if necessary to do so.

ARGUMENT

I. ELIJAH'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION WERE SUFFICIENT TO PRESERVE DISTRICT COURT AND APPELLATE REVIEW

In adopting the magistrate's report and recommendation, the district court held that Elijah's objections were nonspecific and thus insufficient to preserve review in the district court or this Court. *See United States v. Schronce*, 727 F.2d 91, 94 & n.4 (4th Cir. 1984) ("Failure to file specific objections constitutes a waiver of the party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge."). This Court appears to review *de novo* whether a party made a timely and specific objection to a magistrate judge's report and recommendation. *See, e.g., Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315-16 (4th Cir. 2005) (affirming district court's conclusion without mention of deference). But even if abuse of discretion review were appropriate in some cases it would not be here, because the district court's conclusion appears to rest on a misunderstanding of the governing law. *See, e.g., James v. Jacobson*, 6

F.3d 233, 239 (4th Cir. 1993). The district court understood Elijah's objections to the magistrate judge's report and recommendation perfectly well. Indeed, the court's opinion explains Elijah's arguments clearly and in some detail. *See* JA 137 n.3. The substance of the court's holding appears to be that Elijah's objections were "nonspecific" because the magistrate judge's report "has addressed all of Elijah's objections" and "Elijah [was] attempting to reargue his case." JA 137 n.3. That holding reflects a serious misunderstanding of the specificity requirement.

In *Thomas v. Arn*, the Supreme Court upheld the Sixth Circuit's enforcement of a rule, adopted under its supervisory authority, that parties must identify their objections to a magistrate's report and recommendation upon pain of waiver. 474 U.S. 140, 146 (1985). The Court held that "sound considerations of judicial economy" supported that rule, which "prevents a litigant from 'sandbagging' the district judge by failing to object and then appealing." *Id.* at 147-48. Without such a rule, the court of appeals would be forced "to consider claims that were never reviewed by the district court," and the district court would be forced "to review every issue in every case, no matter how thorough the magistrate's analysis and even if both parties were satisfied with the magistrate's report" on that issue. *Id.* at 148. The Supreme Court explained that "Congress would not have wanted district judges to devote time to reviewing magistrate's reports except to the extent that such review is requested by the parties or otherwise necessitated by Article III of the

Constitution." *Id.* at 153. And it held that the Sixth Circuit's rule did not "elevate[] the magistrate from an adjunct to the functional equivalent of an Article III judge" because "[a]ny party that desires plenary consideration by the Article III judge of any issue need only ask." *Id.* at 154. The Court concluded that "a court of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired." *Id.* at 155.

In this case Elijah clearly identified the issues on which further review was desired, and the district court essentially acknowledged as much. But the district court faulted him for "attempting to reargue" issues that the magistrate's "[r]eport has addressed." *See* JA 137 n.3. The court essentially recast the specific objections requirement as a version of the familiar rule that motions for reconsideration cannot simply reargue issues already decided. *Cf. DIRECTV, INC. v. Hart*, 366 F. Supp. 2d 315, 317 (E.D.N.C. 2004) ("Motions to reconsider are not proper where the motion merely asks the court to rethink what the Court had already thought through.") (internal quotation marks omitted).

That was error. Litigants have a right to judicial determination of each and every issue that they want a judge to decide. Considerations of judicial economy certainly support a rule that litigants must clearly identify what they want the judge to decide. But any rule that litigants cannot "reargue" points presented to the

magistrate would "elevate[] the magistrate from an adjunct to the functional equivalent of an Article III judge" in a manner that cannot be squared with Article III. *Arn*, 474 U.S. at 154. The district court's decision thus violates the conditions, identified in *Arn*, that make an objection requirement constitutional.

This Court has held that "to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection," agreeing with four other circuits that had considered the issue. *United States v. Midgette,* 478 F.3d 616, 621-22 (4th Cir. 2007) (citing *United States v. 2121 E. 30th St.,* 73 F.3d 1057, 1060 (10th Cir. 1996); *Howard v. Sec'y of Health & Human Servs.,* 932 F.2d 505, 508-09 (6th Cir. 1991); *Lockert v. Faulkner,* 843 F.2d 1015, 1019 (7th Cir. 1988); *Goney v. Clark,* 749 F.2d 5, 6-7 (3d Cir. 1984)).

In *Midgette,* the defendant advanced two arguments in support of his motion to suppress evidence: (1) that the state "did not have 'reasonable suspicion'" he possessed "contraband" and (2) that "the search did not conform to North Carolina law, which authorized the probation officers, but not police officers, to conduct warrantless searches of probationers." 478 F.3d at 618. A magistrate judge then made proposed findings of fact and recommendations that rejected Midgette's arguments. Midgette filed objections to the report, but his objections "were based

only on his second argument" that the searches did not comport with state law. *Id.* The district court overruled those objections and denied his motion to suppress. *Id.*

Midgette's brief to this Court resuscitated the federal issue that he had omitted from his objections and added a new federal challenge to North Carolina's probation scheme. This Court held that because Midgette had "failed to present his other arguments regarding the constitutionality of the North Carolina probation law and the lack of reasonable suspicion" to the district judge in his objections, he waived his right to appeal these issues. *Id.* at 619. This Court explained that the right to appellate review "of particular issues" is waived by "failing to file timely objections specifically directed to those issues," and that "a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." *Id.* at 621-22. But *Midgette* does not suggest or support any rule that litigants may not *reargue* particular points (or all points, for that matter) presented to the magistrate. To the contrary, it clarifies what *Arn* had explained: that the purpose of the objection requirement is to ensure that the district court does not have to review magistrate determinations *that both parties now agree with.* The objection rule "conserves judicial resources by training the attention of both the district court and the court of appeals upon only those issues that remain in dispute after the magistrate judge has made findings and recommendations." *Id.* at 621.

The district court in this case relied on *Nichols v. Colvin* for the proposition that "a mere restatement of the arguments raised in summary judgment filings does not constitute an 'objection' for the purposes of district court review." 100 F. Supp. 3d 487, 497 (E.D. Va. 2015); *see* JA 137 n.3. The *Nichols* court was frustrated by the fact that Nichols simply "object[ed] to all of [the magistrate judge's] findings" and the "brief outlining" his objections was "largely a summary, and at times a direct copy, of the [memorandum in support of motion for summary judgment] he submitted to" the magistrate. *Nichols,* 100 F. Supp. 3d at 498. As a result, Nichols' objections were held by the district court to "amount to nothing more than a rehashing of the arguments raised in his Motion for Summary Judgment." *Id.* at 497. *Nichols* cited an unpublished decision of this Court for the proposition that "[a] general objection to the entirety of the magistrate judge's report is tantamount to a failure to object" at all, *id.* (quoting *Tyler v. Wates*, 84 F. App'x 289, 290 (4th Cir. 2003)), and drew the conclusion that "[l]ikewise, a mere restatement of the arguments raised in the summary judgment filings does not constitute an 'objection' for the purposes of district court review." *Id.*

With respect, forbidding litigants from restating arguments previously presented to the magistrate judge is a bridge too far. A district court can insist on a clear statement of what the litigant does, and does not, disagree with in the magistrate's report. But it cannot insist that litigants abandon issues in order to

narrow the case, on the premise that it would "negate the entire purpose of magistrate judge review" if the district court is asked to reconsider most or all of the issues in the case. *Id.* at 498. The "waste" of judicial resources that a valid objections requirement seeks to avoid is the waste associated with reviewing issues "even if both parties were satisfied with the magistrate's report" on those issues. *Arn*, 474 U.S. at 148; *see also Midgette*, 478 F.3d at 621 ("The requirement to make objections ... conserves judicial resources by training the attention of both the district court and the court of appeals upon only those issues that remain in dispute"). Plenary district court review of issues that remain in dispute is not a "waste"; it is a constitutional imperative.

The *Nichols* court also relied on the Sixth Circuit's decision in *Howard* in holding that "a mere restatement of the arguments raised in the summary judgment filings does not constitute an 'objection' for the purposes of district court review." *Nichols,* 100 F. Supp. 3d at 497 & n.4 (citing *Howard*, 932 F.2d at 509). But the objections at issue in *Howard* "clearly used paragraphs from a stock objection form" and "referred to persons and documents not involved in [the] case," including the wrong magistrate, making it virtually impossible for the district court to "know what Howard thought the magistrate had done wrong." 932 F.2d at 508. The objections consisted of a recitation of the procedural history, one sentence stating that "Plaintiff now specifically objects to the determination of the Magistrate denying Plaintiff's

request for relief," and a statement that Howard was relying on "the Brief in support of its Motion for Summary Judgment" (a motion which was never filed). *Id.* at 507-08. Because the filing at most "evince[d] an intent to object to something in the magistrate's report," the Sixth Circuit "interpret[ed] [it] as being a general objection to the entire magistrate's report." *Id.* at 508. Unsurprisingly, the court of appeals then concluded that "[a] general objection to the entirety of the magistrate's report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless." *Id.* at 509.

We agree that a mere general objection is insufficient. But there is a critical difference between holding that a litigant cannot just object *generally*, leaving the district court in the dark about what he agrees with and what he does not, and the district court's suggestion in this case that litigants are not allowed to "*reargue*" some or even all of the points that the magistrate "has addressed." JA 137 n.3.

The other circuit court cases cited in *Midgette* confirm those principles. In *United States v. 2121 E. 30th St.*, the litigant's objection "consisted of only two sentences asking that the district court reconsider the magistrate's report and recommendation" based on the briefing before the magistrate. 73 F.3d 1057, 1060 (10th Cir. 1996). In *Lockert v. Faulkner*, the prisoner did "generally object" to the magistrate's report but did not identify (for the district court *or* the magistrate) the

issue he wanted to raise on appeal. 843 F.2d 1015, 1019 (7th Cir. 1988). The Seventh Circuit sensibly concluded that "[j]ust as a complaint stating only 'I complain' states no claim, an objection stating only 'I object' preserves no issue for review." *Id.* And in *Goney v. Clark* the prisoner's objections "were clearly general in nature" and "stated that his intent was only to appeal the Magistrate's bias." 749 F.2d 5, 6-7 (3d Cir. 1984). "There was no objection to a specific portion of the report." *Id.* at 7.

Unlike the litigants in those past cases whose objections were "general" or insufficiently specific, Elijah clearly identified his objections to the magistrate's report and supported them with arguments as to why he found the magistrate's conclusions incorrect. *See* JA 131-34. Indeed, the district court understood and accurately summarized Elijah's objections in adopting the magistrate judge's report. *See* JA 137 n.3. The district court offered no genuine *specificity* critique at all, instead remarking that Elijah's objections "reargue[d]" points already addressed by the magistrate. JA 137 n.3. That is not a proper basis for a finding of nonspecificity, and it raises serious constitutional concerns on top of that. And even that (irrelevant) critique was not fair. Elijah responded directly to the magistrate's reasoning with new points, including an argument that the revocation sentence was not separate from the original sentence because *Haymond* abrogated this Court's decision in *Ward*—a case that Elijah had never previously addressed. JA 132-33.

The district court thus erred in adopting the magistrate's report and recommendation without any analysis.

II. THE BOP MISCALCULATED ELIJAH'S RELEASE DATE BY FAILING TO GIVE HIM CREDIT FOR GOOD CONDUCT TIME FROM HIS ORIGINAL IMPRISONMENT

If this Court reaches the merits of Elijah's claims, it should hold that he was entitled to received additional good conduct time credit under the First Step Act for his original 108-month term of imprisonment. The correct interpretation of the First Step Act is a question of law, reviewed *de novo*. *See, e.g., United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020).

The First Step Act "implemented a number of prison and sentencing reforms" designed to reduce the sentences of certain defendants. *Bottinelli v. Salazar*, 929 F.3d 1196, 1197 (9th Cir. 2019). Amending sections of the Fair Sentencing Act of 2010, the First Step Act increased the number of good conduct time credits a defendant could receive by altering the manner in which the BOP calculates them. First Step Act § 102(b)(1)(A). The practical result was to increase the number of good conduct time credits an inmate could receive by seven days annually—from 47 to 54. *See Bottinelli*, 929 F.3d at 1197.

Section 102(b)(1)(A) applies retroactively "to offenses committed before, on, or after the date of enactment of this Act except that such amendments shall not apply with respect to offenses committed before November 1, 1987." The

Applicant Details

First Name	**Sydney**
Last Name	**Chapman**
Citizenship Status	**U. S. Citizen**
Email Address	**sydneyechapman@gmail.com**
Address	**Address** Street **1135 E 45th St Apt 3W** City **Chicago** State/Territory **Illinois** Zip **60653** Country **United States**
Contact Phone Number	**301-875-8461**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Professional Organization

Organizations **Just The Beginning Foundation**

Recommenders

Doerfler, Ryan
rdoerfler@law.harvard.edu
Buss, Emily
ebussdos@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1853 Foxwood Circle
Bowie, MD 20721

June 8, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am a rising third-year law student at the University of Chicago Law School, and I am excited to apply for a clerkship in your chambers. I was born and raised in Prince George's County, Maryland. I believe that clerking for the United States District Court for the Eastern District of Pennsylvania would provide me with a practical understanding of trial proceedings and expose me to a wide range of legal topics. In addition, I value the opportunity to develop excellent research and writing skills as a clerk in your chambers. I am particularly interested in clerking for you and would value your mentorship as I begin my own career as a litigator.

Serving in leadership has given me the collaborative skills needed to work in close quarters on important issues. As President of our Black Law Students Association, I put action to my strong commitment to legal diversity, leading a team of ten people to provide academic and professional opportunities to law students and future law students. This experience also gave me a strong belief in the importance of being a collaborative team player. I understand the value of contributing and elevating different perspectives to the important work of the court.

I also have strong legal research and analytical skills. Prior to law school, I gained practical experience as a paralegal by assisting attorneys in drafting legal documents and memoranda, performing legal research, and preparing evidence for trial. During trials, I was tasked with taking notes, preparing witnesses, providing feedback on courtroom climate, and generating new exhibits as needed. I formed an interest in litigation and clerking after working on my first trial. I found the opportunity to observe attorneys in the courtroom and their interactions with the judge intriguing and insightful. At Sidley Austin, I worked on a variety of litigation projects, including DOJ investigations regarding criminal charges and antitrust violations. I also collaborated with associates on a legal brief analyzing complex contract damages provisions. These experiences as a Summer Associate further solidified my interest in litigation.

My resume, transcript, and writing sample are enclosed. Letters of recommendation from Professors Emily Buss, Ryan Doerfler, and Michael Morse will arrive under a different cover. Should you require additional information, please let me know.

Sincerely,

/s/ Sydney Chapman

Enclosures

Sydney Chapman

1135 E 45th St, Apt 3w Chicago IL 60653 | (301) 875-8461 | sydchap@uchicago.edu

EDUCATION

The University of Chicago, Chicago, IL
Juris Doctor, expected June 2024

- Honors: Donald Egan Scholarship Recipient from the University of Chicago Law School, Illinois Judicial Council Scholarship Recipient, BLSA Midwest Chapter of the Year Award
- Activities: President of the Black Law Students Association, Entertainment and Sports Law Society 1L Representative

University of Maryland, College Park, MD
Bachelor of Arts, Criminology & Criminal Justice, Minor in Spanish, May 2019

- Honors: University Honors College, Dean's List 2015- 2019, National Society of Collegiate Scholars, Alpha Lambda Delta and Phi Eta Sigma Honors Societies
- Activities: Study Abroad in Thailand and Cambodia studying human trafficking, Alpha Kappa Alpha Sorority, Inc., Mock Trial Team, University of Maryland Women's Basketball Team Manager

EXPERIENCE

Davis Polk Wardell LLP, New York, NY
Summer Associate & Diversity, Equity & Inclusion Fellow, Summer 2023

Sidley Austin LLP, Washington, DC
1L Fellow, Summer 2022

- Conducted legal research in various practice areas including white collar investigations and commercial litigation
- Assisted in developing multiple Day 1 presentations defending transactions subject to antitrust investigations by DOJ and FTC
- Drafted interview notes capturing client meetings in preparation for DOJ interviews

Melehy & Associates, Silver Spring, MD
Paralegal, October 2019 – April 2021

- Assigned to Trial Team for 2-week civil trial in federal court; created exhibit binders, helped attorneys during witness examinations, coordinated witnesses, and helped draft examination questions
- Assisted attorneys in drafting motions, memos, briefs and other legal documents regarding employment law
- Delivered excellent customer service by attentively listening and responding to client needs and concerns via telephone, email and in-person communication
- Assisted in all aspects of pre-trial hearing preparation including creating exhibits and outlining documents
- Supported attorneys during EEOC hearings and court proceedings
- Performed legal research in Westlaw to help attorneys write briefs and confirm rules

Homeland Security USCIS, Washington, DC
Research Intern: Refugee, Asylum and International Operations Directorate, June 2018 – May 2019

- Researched human rights and country conditions to aid in the adjudication of refugee and asylum applications
- Responded to queries relating to socio-political conditions, natural disasters, religious persecution, and armed rebellions across the world

Georgetown Law Criminal Justice Clinic, Washington, DC
Intern Investigator: Criminal Defense & Prisoner Advocacy Clinic, January 2018 – May 2018

- Performed all aspects of investigations such as locating and speaking to witnesses, writing investigative memoranda, and performing comprehensive background investigations

INTERESTS

- Weight lifting, crocheting, ceramics, women's collegiate basketball

THE UNIVERSITY OF CHICAGO

Name: Sydney Chapman
Student ID: 12334940

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of Maryland at College Park
College Park, Maryland
Bachelor of Arts 2019

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	177
LAWS	30211	Civil Procedure Emily Buss	4	4	178
LAWS	30611	Torts Saul Levmore	4	4	177
LAWS	30711	Legal Research and Writing Michael Morse	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Sonja Starr	4	4	177
LAWS	30411	Property Lee Fennell	4	4	177
LAWS	30511	Contracts Eric Posner	4	4	178
LAWS	30711	Legal Research and Writing Michael Morse	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Michael Morse	2	2	178
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	174
LAWS	40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	177
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182
LAWS	47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	175

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Geoffrey Stone	3	3	176
LAWS	43224	Admiralty Law Randall Schmidt	3	3	176
LAWS	53704	Hate Crime Law Req Designation: Meets Writing Project Requirement Juan Linares	3	3	178
LAWS	90226	Housing Initiative Transactional Clinic Jeffrey Leslie	1	0	

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	45701	Trademarks and Unfair Competition Omri Ben-Shahar	3	3	175
LAWS	46101	Administrative Law David A Strauss	3	3	176
LAWS	53201	Corporate Criminal Prosecutions and Investigations Andrew Boutros	3	3	180
LAWS	90226	Housing Initiative Transactional Clinic Jeffrey Leslie	1	0	

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	43244	Patent Law Jonathan Masur	3	3	177
LAWS	47101	Constitutional Law VII: Parent, Child, and State Emily Buss	3	3	177
LAWS	53363	The Law, Politics, and Policy of Policing Sharon Fairley	3	0	
LAWS	53382	The Constitutional Rights of Young People, from Young People's Point of View Emily Buss	3	3	180
LAWS	90226	Housing Initiative Transactional Clinic Jeffrey Leslie	1	0	

Honors/Awards
The Donald E. Egan Scholar Award, to a student who has demonstrated a strong interest in the Law School and has a reputation for integrity

End of University of Chicago Law School

Date Issued: 06/02/2023


THE UNIVERSITY OF
CHICAGO

May 30, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Sydney Chapman for a clerkship in your chambers. Sydney was a student in my Legislation & Statutory Interpretation course at the University of Chicago, where I was a member of the faculty until Fall 2023. Legislation & Statutory Interpretation is a large lecture course that is part of the mandatory 1L curriculum at Chicago. Sydney's exam placed her in the top handful of students across two sections of the course (covering two thirds of the 1L class). That outcome was consistent with Sydney's performance throughout the quarter. During class, Sydney consistently gave thoughtful and precise answers to questions. Similarly, Sydney would raise interesting questions both during and outside of class that reflected both careful reading of the cases and supporting materials as well as significant reflection. Turning to her exam, Sydney was asked to assess different possible actions the executive concerning federal student loans under a variety of federal statutes. Sydney's analysis of that problem was clear and careful, identifying a wide array of grounds upon which the various policies considered, ranging from a continuing pause on payments to outright cancellation, might be challenged and articulated a range of plausible responses, while at the same time acknowledging the difficulties of the government's position (in the exam, students were asked to write from the perspective of a Department of Justice attorney preparing an objective memo on the matter). Sydney's answer was also a model of good legal writing, especially given the constraints of an exam setting, with excellent organization and exceptionally clear and concise legal prose. Based on this performance, I have great confidence in Sydney's ability to prepare top quality bench memoranda and draft opinions.

In addition to her apparent academic talents, Sydney has showed tremendous capacity for leadership during her time at the Law School. As President of the Black Law Students Association (BLSA), Sydney worked to create a prelaw outreach program, identifying and providing support to potential law students, providing mentoring, application review, and helping to answer questions about admissions. That program, which required formal amendment of the BLSA constitution, is consistent with Sydney's more general commitment to diversifying the legal field and, in particular, the composition of law school classes. As a faculty member of color also committed to a more demographically representative legal profession and legal academy, I admire greatly Sydney's effort and ingenuity in advancing that cause. Especially so given that, all the while, Sydney was managing the pressure of being a student at one of the nation's most demanding law schools. That commitment reflects, I think, tremendous moral character and also incredible drive. That combination of traits gives me confidence that Sydney continue to make significant, positive impacts on legal culture over the course of her career.

As the above makes clear, I recommend Sydney highly and without reservation. Sydney would make an excellent law clerk, and any judicial chambers would be lucky to have her. Please feel free to contact me by phone or email if there is any additional information that I can provide.

Best regards,

Ryan D. Doerfler

Ryan Doerfler - rdoerfler@law.harvard.edu

Professor Emily Buss
Mark and Barbara Fried Professor of Law
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June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in strong support of Sydney Chapman's application for a clerkship in your chambers. Sydney has been in three of my classes, two more conventional and one entirely unconventional. In Civil Procedure and Constitutional Law VII, I came to know a thoughtful and engaged student who came to class well prepared and interested, in my unconventional seminar, the Constitutional Rights of Young People from the Young People's Point of View, I discovered a gifted leader with exceptional skills of communication and compassion. All of these qualities together make clear to me that Sydney will make a superb clerk, bringing strong intellectual and personal skills to the work.

In Civil Procedure, a course taught to our first years at the very beginning of their law school careers, Sydney was remarkably comfortable with the material from the first days of class. The confidence and competence with which she responded to early questioning was noteworthy, and she became one of the few students I knew I could return to when others were stuck. I saw the same intellectual maturity and thoughtfulness this past spring in my Constitutional Law class, which focused on the constitutional rights of children and parents.

Sydney's exceptional personal qualities and their relevance to lawyering became clear to me through her work in my seminar. In this seminar, I collaborated with nine law students, Sydney among them, in teaching youth who were incarcerated in the Illinois Juvenile Justice System about their constitutional rights. There was a classroom component that involved large group lecture and discussions led by me and small group discussions led by the law students. The law students were also paired with the incarcerated youth and held additional weekly one-on-one sessions by video with them. Sydney was paired with a young man who had been incarcerated through most of his adolescence for a serious offense. He had missed a lot of school and was quite reserved at the beginning of the term. Sydney was masterful in developing rapport with this student and, through this process, enabling his learning and participation. By the end of the quarter, her paired student was one of the most active and thoughtful participants, making persuasive arguments to challenge the points made by his classmates that demonstrated his understanding of the law and his mastery of oratorical skills. This was clearly all to Sydney's credit. I mention this transformation and Sydney's role in it in part because I think it captures qualities that are important to successful lawyering—she conveyed a comfort with and understanding of the law that established her credibility with her assigned student. But I also mention this because it says so much about Sydney as a human being. Through her care and attention, she inspired the trust that was crucial to this delicate learning process.

Sydney's resume reports that she is a recipient of the Donald Egan Scholarship from the University of Chicago Law School. I was not familiar with this scholarship, so I looked it up. The scholarship is awarded to law students who, in addition to financial need and a strong academic performance "have demonstrated interest in the Law School, leadership potential within the larger legal community, an aggressive desire to succeed tempered by integrity and a reputation for toughness, honesty, and fair dealing." That is Sydney. Sydney is a leader in the law school community, and she will surely become a leader in the larger legal community. I hope she can begin her illustrious career with a clerkship in your chambers.

If I can be of any additional assistance in your consideration of Sydney's application, please do not hesitate to contact me at ebussdos@uchicago.edu or (312) 493-8949.

Sincerely,
Emily Buss

Sydney Chapman
Writing Sample

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. In this assignment, I was asked to write a brief for plaintiff-appellant Danny Midway on fictional claims of negligence and breach of contract in the Seventh Circuit without having read the appellee's brief. To create a ten-page writing sample, I omitted the Statement of Jurisdiction, Statement of the Issue, Statement of the Case, Summary of Argument, Standard of Review, and the Conclusion. I received feedback from my professor and feedback from my school's writing coach. I have provided a basic summary of the facts below.

Appellant Danny Midway purchased an online vault from DataVault to store his personal and business passwords, usernames, and financial information. DataVault generates user IDs for each customer that includes their social security number and full name. The Department of Homeland Security issued a notice to all companies using Shaffer Software warning them to update their software. Following the notice, DataVault did not update their software and suffered a data breach. Hackers downloaded the entire vaults and internal IDs of all of DataVault's customers. To remedy this hack, DataVault offered free credit monitoring and identity theft services to all customers. DataVault customers have not yet experienced fraudulent transactions or experienced identity theft following the breach. Midway sued for negligence and implied breach of contract alleging three injuries: (1) increased risk of identity theft and fraudulent charges, (2) personal and business costs from migrating and monitoring his accounts, and (3) emotional distress. The district court granted DataVault's Rule 12(b)(1) motion to dismiss for lack of Article III standing.

VII. ARGUMENT

Article III of the U.S. Constitution limits federal courts' jurisdiction to "Cases" and "Controversies." U.S. CONST. art. III, § 2. To establish Article III standing, a litigant must show three things. The litigant must show that (1) he suffered an injury in fact, (2) there is a "causal connection between the injury and the conduct complained of," and (3) the injury in fact is likely to be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 112 S. Ct. 2130, 2136 (1992). For the harm to satisfy the injury-in-fact requirement, it must be "concrete, particularized and actual or imminent." *Id.* at 2134.

Tangible harms, "such as physical harms and monetary harms," qualify as concrete injuries in fact. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Intangible harms can also be concrete, but the courts look to whether the intangible harms have a "close relationship" to a harm traditionally recognized as a basis for a lawsuit at common law in U.S. courts. *Id. See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Those traditionally recognized harms include disclosure of private information. *TransUnion*, 141 S.Ct. at 2204. A claim based on a statutory violation would be considered an injury-in-law claim. The court follows this same analysis for injury-in-law claims because statutory violations do not automatically qualify as injuries in fact. *See id.* at 2205. A plaintiff who only suffers a statutory violation, absent physical or monetary harm, would have to show that the violation has a close relationship to a harm traditionally recognized. *Id.* at 2204-5.

The resulting harms to Midway are "fairly traceable" to Datavault's data breach. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1140 (2013). The injury is also judicially redressable in the form of damages to compensate Midway. This brief will discuss each claim of injury separately and explain why each independently satisfies the Article III requirements.

A. Midway has Article III Standing Based on Costs Incurred

Midway has Article III standing based on the incurred mitigation expenses involved with monitoring and updating his personal and business financial accounts due to the substantial risk of identity theft and fraudulent charges. *Id.* at 1143. *Clapper* stated that a litigant must show that the "threatened injury is certainly impending" and that a litigant cannot recover for mitigation expenses when the harm is not imminent. *Id.* at 1143, 1152. A litigant "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Id.* at 1143. However, the reasoning in *Clapper* does not require plaintiffs to demonstrate that "it is literally certain that the harms they identify will come about." *Id.* at 1150. The Court "has found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.*

1. The Offer of Credit Monitoring Demonstrates a Substantial Risk of Future Harm

Datavault's offer of credit monitoring indicates a recognition of a substantial risk of future harm. In *Remijas v. Neiman Marcus Grp., LLC*, this Court found standing for plaintiffs who's credit card information was compromised following a data breach from Neiman Marcus. 704 F.3d 688, 689-90 (7th Cir. 2015). *Remijas* emphasized the importance of the offer of credit monitoring, noting that "it is telling in this connection that [defendant] offered one year of credit monitoring and identity theft protection." *Id.* at 694. The presence of an offer of credit monitoring and identity theft protection indicates that Datavault does not think the "risk is so ephemeral that it can be safely disregarded." *Id*. Additionally, "these credit-monitoring services come at a price that is more than *de minimis*." *Id*. *Remijas* notes that even "an affected customer, having been notified by [defendant] that her card it at risk, might think it necessary to subscribe to a service that offers monthly credit monitoring" and "that easily qualifies as a concrete

injury." *Id.* When a corporation offers credit monitoring and identity theft protection services, it has identified a substantial risk of future harm and is trying to participate in preventing that harm. Datavault's participation in the mitigation efforts demonstrates that Midway faces a substantial risk of identity theft and fraudulent charges.

2. Midway's Mitigation Efforts to Avoid Future Harm Were Reasonable

Midway's mitigation actions were objectively reasonable and satisfy the injury-in-fact requirement. The Seventh Circuit has found the that standing requirements were satisfied for costs incurred in migrating accounts because "the value of one's own time needed to set things straight is a loss from an opportunity-cost perspective" and so "these injuries can justify money damages." *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018). Midway was not attempting to manufacture standing by using a telephone to migrate his accounts. *Midway*, at 6-7. All of his personal and business information was stolen and he had a valid fear of changing passwords via the internet. *Id.* at 5. The hackers likely have his personal and business bank account and email passwords (only protected by an encrypted password). *Id*. The hackers can use the Forgot Password feature to reset the password via email and retrieve that email to set a new password with little effort. Midway's actions were justified because there is an "objectively reasonable likelihood" that the injury will occur. *Clapper*, 133 S. Ct. at 1147. In addition, Datavault's data breach forced him to stop using his business credit card, placing a huge financial toll on his small business. *Id.* at 7. Midway did not have access to credit for over a year, severely affecting his inventory and forcing him to cancel 3,800 orders. *Id.* "Monetary harms readily qualify as concrete injuries under Article III." *TransUnion,* 141 S. Ct. 2197, *see also* 2200. Midway's personal and business injuries resulting from his mitigation efforts are reasonable and qualify as injuries in fact.

B. The Increased Risk of Identity Theft and Fraudulent Charges is an Injury In Fact

1. Article III Only Requires a Substantial Risk of Future Harm

A substantial risk of future injury can satisfy the injury-in-fact requirement. In addition to being "concrete, particularized, and actual or imminent," a threatened injury must be "certainly impending" to satisfy the injury in fact requirement. *Clapper,* 133 S. Ct. at 1147. A simple allegation of future harm is not sufficient. *Id. Clapper* described a "substantial risk" standard that does "not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Id.* at 1150. The Court has found standing based on a "substantial risk that the harm will occur." *Id*. Courts have emphasized that victims of a data breach "should not have to wait until hackers commit identity theft" in order to have standing because there is an "objectively reasonable likelihood for such injury to occur." *Remijas,* 794 F.3d at 693; *Clapper,* 133 S. Ct. at 1147.

2. The Data Breach Caused a Substantial Risk of Future Harm

The extremely sensitive and private information stolen during Datavault's data breach creates a substantial risk of future harm. Hackers stole Midway's full name and SSN along with his entire personal vault. DataVault only protected his information with an encrypted password that his hackable in less than two hours. *Midway*, at 4-5. Supreme Court and Seventh Circuit precedent support Midway's claim of risk of identity theft as an injury in fact.

The *Remijas* plaintiffs showed an "increased risk of future fraudulent charges and greater susceptibility to identity theft." *Remijas*, 794 F.3d at 692. Hacker's stole plaintiffs' credit card information and some plaintiffs also experienced fraudulent charges on their cards. There was "no need to speculate" about whether information was stolen. *Id.* at 693. In data breach cases, "the purpose of the hack is, sooner or later, to make fraudulent charges or assume those

customers' identities." *Id*. Midway's case is even more threatening than *Remijas* because his stolen data is more sensitive, containing SSNs and bank account numbers. *Midway*, at 5. The substantial risk of identity theft is evident and certainly impending.

In *Clapper*, the Supreme Court found no Article III standing because the injury was too speculative. *Clapper*, 133 S. Ct. at 1143. There, plaintiffs believed their communications would be monitored due to a statute allowing governmental surveillance without probable cause for communications between suspected terrorists and people located within the United States. *Id.* at 1145. There was no injury in fact because the allegation of future injury was too speculative to satisfy the certainly impending requirement. *Id.* at 1143. The government would have to (1) target plaintiffs' communications, (2) use the challenged statute to gain approval for the surveillance, (3) receive authorization from a court, and (4) succeed in infiltrating the communications. *Id.* at 1149-50. The court referred to these actions as a "speculative chain of possibilities" that was insufficient to establish standing based on the risk of future harm. *Id.* at 1150.

Midway's case is distinguishable from *Clapper*. Here, the theft has occurred and there is no "speculative chain of possibilities" required to establish the certainly impending risk of future harm. *Id*. Hackers have obtained Midway's name and SSN. The only steps left for the hackers are breaking the encrypted vault password and engaging in fraudulent activity. This could happen quickly; the district court noted that "independent researchers were able to decrypt a substantial portion of stolen, encrypted passwords in under two hours." *Midway*, at 4. Additionally, the purpose of the hack is "to make fraudulent charges or assume those customer's identities." *Remijas*, 794 F.3d at 693. The combination of these facts makes it clear that there is a substantial risk of future harm.

3. The Risk of Identity Theft Is Connected to a Harm Traditionally Recognized by Courts

Midway's increased risk of identity theft and fraudulent charges is a concrete, intangible harm because it has a close relationship to the disclosure of private information. In determining concreteness for an intangible harm, courts look for a "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion,* 141 S. Ct at 2204. Among those "traditionally recognized" is disclosure of private information. *Id*. Datavault's data breach exposed Midway's information, producing the same effect as a disclosure of his private information and qualifying the intangible harm as concrete.

4. The District Court Improperly Applied *Remijas* and Failed to Consider the Presence of Credit Monitoring

The district court relied on a mischaracterization of *Remijas* in *Kylie v. Pearson PLC*. 475 F. Supp. 3d. 841 (2020). *Kylie* stated that "whether a data breach exposes consumers to a material threat of identity theft turns on two factors" derived from *Remijas*: "(1) the sensitivity of the data in question… and (2) the incidence of fraudulent charges and other symptoms of identity theft." *Kylie*, 475 F. Supp 3d. at 841.

Kylie mischaracterized the incidence of fraudulent charges as a dispositive factor in *Remijas*. *Id.* at 846. *Remijas* was a class action case where 350,000 customers' credit card information was stolen, but only 9,200 experienced fraudulent charges. *Remijas,* 794 F.3d at 690. *Remijas* determined that the *entire* class of 350,000 customers satisfied the Article III standing requirement. *Id.* at 697. For those plaintiffs without fraudulent charges, *Remijas* concluded that requiring them to wait for a future harm to materialize in order to satisfy standing would create an argument of causation for defendants. *Id.* at 693. As time increases between the data breach

and the identity theft, the easier it is for a defendant to argue that the identity theft is not caused by the data breach. *Id*. The fact that Midway has not yet experienced fraudulent charges is not dispositive on whether the future harm is concrete because the incidence of fraud was not central to *Remijas'* reasoning. *Midway,* at 8. *Kylie* improperly requires an incidence of fraud for a material threat of identity theft.

Kylie also failed to consider whether the information had already been stolen. *Remijas* considered the presence of theft as a factor in determining whether the risk of future harm is "certainly impending." *Remijas*, 794 F.3d at 693. Remijas also identified the offer of credit monitoring as an important factor in identifying a future harm of identity theft as "certainly impending." *Id.* at 694. "It is unlikely that [defendant] did so because the risk is so ephemeral that it can be safely disregarded." *Id*. *Kylie* regarded an offer of credit monitoring as serving a "minor part in standing analysis," which does not follow from *Remijas*. *Kylie*, 475 F. Supp 3d. at 848. Midway's SSN, bank account numbers and routing numbers are very likely to facilitate identity theft and *Kylie*'s characterization of credit monitoring as a miniscule factor should not be credited. The sensitivity of the data in question, Datavault's offering of credit monitoring, and the fact that the data is already stolen demonstrate that the threatened harm is certainly impending. *Midway*, at 5.

Lastly, Midway's harms are distinguishable from the *Kylie* plaintiffs, who lost different types of data: names, emails, birthdays, home address, telephone numbers, and student ID numbers. *Kylie*, 475 F. Supp 3d. at 846. *Kylie* admitted that plaintiff's information could not be 'easily used in fraudulent transactions' and that the data was 'far less likely to facilitate identity theft than the credit and debit card numbers at issue in *Remijas*." *Id.* at 846-7 (quoting *In re Vtech Data Breach Litigation*, No. 15 CV 10889, 2017 WL 2880102, at *4 (N.D. Ill. July 5,

2017)). Midway's stolen data is far more likely to facilitate identity theft than the stolen data in *Remijas* and *Kylie*.

5. *TransUnion* and *Pierre* Do Not Apply and *Remijas* Remains Good Law

There is no contrary recent precedent that would impact the holding in *Remijas*; neither *TransUnion* nor *Pierre v. Midland Credit Management* dealt with data breaches. *TransUnion,* 141 S. Ct. at 2200; *Pierre*, 29 F.4th 934 (2022). Neither *TransUnion* nor *Pierre* apply to Midway's case because he brings common-law claims, not statutory violations. TransUnion violated the Fair Credit Reporting Act (FCRA) by failing to use reasonable procedures to ensure the accuracy of plaintiffs' credit. *TransUnion,* 141 S.Ct at 2200. TransUnion placed potential-terrorist flags on plaintiffs' credit files without performing due diligence on the designations. *Id*. at 2201. In addition, TransUnion disseminated 1,853 of plaintiffs'(Group A) credit files to third parties. *Id.* at 2200. The main issue involved the 6,332 plaintiffs' (Group B) credit files that included the terrorist mark, but TransUnion did not give the files to third parties. *Id.*

Group A had standing because they "demonstrated a concrete reputational harm" from a statutory violation that had a close relationship to a harm traditionally recognized as providing a basis for standing in U.S. courts. *Id.* at 2200, 2204. *TransUnion* identified "reputational harms" as intangible harms that maintain a close relationship to those traditionally recognized by the courts. *Id.* at 2204. Group B only suffered an injury in law and the risk of future harm was not sufficiently concrete: TransUnion's "retention of information unlawfully obtained, without future disclosure, traditionally has not provided the basis for a lawsuit in American Courts." *Id.* (quoting *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 930 (2016)).

TransUnion does not apply to Midway's facts and *Remijas* remains good law regarding common law claims. *TransUnion* plaintiffs alleged a statutory violation under the FCRA, and the